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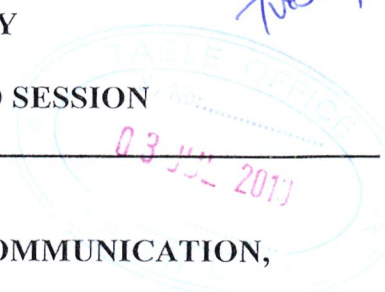
REPUBLIC OF KENYA



THE NATIONAL ASSEMBLY

TWELFTH PARLIAMENT - SECOND SESSION

SNA
3/7/18
Paper laid by
Chairperson DC on
Communication
Ken
Rwinyi, MP
Tuesday 3/7/2018
AK



THE DEPARTMENTAL COMMITTEE ON COMMUNICATION,
INFORMATION AND INNOVATION

REPORT ON THE CONSIDERATION OF THE COPYRIGHT (AMENDMENT)
BILL, 2017



DIRECTORATE OF COMMITTEE SERVICES
CLERK'S CHAMBERS
PARLIAMENT BUILDINGS
NAIROBI-KENYA

JUNE, 2018

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LIST OF ABBREVIATIONS AND ACRONYMS

CAK	Communications Authority of Kenya.
Cap.	Chapter.
CEWG	Creative Economy Working Group
ICT	Information and Communications Technology
ISP	Internet Service Provider
KRA	Kenya Revenue Authority
KAMP	Kenya Association of Music Producers
KECOBO	Kenya Copyright Board
MCSK	Music Copyright Society of Kenya
MMC	MMC Law Africa
PHAT	PHAT! Intellectual Property
PRISK	Performers Rights Association of Kenya
RIAK	Record Industry Association of Kenya

ANNEXTURES

- Annexure 1 National Assembly Advertisement in the Daily Nation and Standard Newspapers dated 6th February, 2018
- Annexure 2 Minutes
- Annexure 3 Adoption List
- Annexure 4 Memorandum submitted to the Committee by Signs Media Kenya Ltd
- Annexure 5 Record Industry Association of Kenya (RIAK)
- Annexure 6 Phat! Intellectual Property (PHAT)
- Annexure 7 Aga Khan University
- Annexure 8 Albert Gacheru Kiarie
- Annexure 9 Anjarwalla & Khanna,
- Annexure 10 Kenya Association of Music Producers (KAMP)
- Annexure 11 Creative Economy Working Group
- Annexure 12 MMC Africa Law (MMC)
- Annexure 13 Moses Suywa Weche
- Annexure 14 Cornelious Omwitakho
- Annexure 15 Andrew Opwoko Mumia
- Annexure 16 Multichoice Kenya Limited ✓
- Annexure 17 Performers Rights Society of Kenya (PRISK)
- Annexure 18 Irene Murugi Kariuki
- Annexure 19 International Public Lending Right Network
- Annexure 20 Association of Disc Jockeys East Africa
- Annexure 21 Kenya Copyright Board (KECOBO).

THE CHAIRPERSON'S FOREWORD

The Departmental Committee on Communication, Information and Innovation is established and mandated under Standing Order No. 216 to *inter alia*; 'Study and review all the legislation referred to it'.

The Copyright (Amendment) Bill, 2017 a Bill for an Act of Parliament to amend Copyright Act, 2001 sponsored by Hon. Aden Duale, was read a first time on 28th September, 2017 and subsequently referred to the Departmental Committee on Communications, Information and Innovation for consideration and thereafter report to the House pursuant to Standing Order No. 127(1). The Bill underwent the second reading on 30th November, 5th and 6th December, 2017.

The Committee placed an advert in the local dailies and wrote to the key stakeholders inviting them to submit their views on the Bill on or before Tuesday 13th February, 2018.

Upon receipt of the memoranda, the Committee held a total of eighteen meetings to meet with the stakeholders and consider the submissions received as incorporated in this report. A total of eighteen memoranda were received from members of the public and institutional stakeholders in the ICT sector.

The Committee held meetings with the Kenya Association of Music Producers, Creative Economy Working Group, MMC Africa Law, the Aga Khan University, Signs Media Kenya Limited, Multi choice Kenya Limited, Anjarwalla Khanna, Music Copyright Society of Kenya, Performers Rights Society of Kenya and Irene Murugi to deliberate on their memoranda.

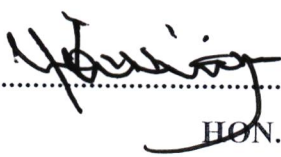
Thereafter, the Committee proceeded for a report writing retreat which provided the opportunity to consider the submissions of the public and stakeholders and to further draft, consider and approve its Report.

Acknowledgements

The Committee appreciates the assistance provided by the Office of the Speaker and of the Clerk of the National Assembly that enabled it to discharge its functions in considering the Copyright (Amendment) Bill, 2017.

I take this opportunity to thank all Members of the Committee for their input and valuable contributions during the deliberations of the submissions by different stakeholders on the Bill.

Pursuant to provisions of Standing Order 199 (6), and on behalf of the Departmental Committee Communication, Information and Innovation, it is my pleasant privilege and honor to present to this House the Report of the Committee on its consideration of the Copyright (Amendment),2017.

SIGNED: .....
HON. WILLIAM KISANG, MP
(CHAIRPERSON)

COMMITTEE ON COMMUNICATION, INFORMATION AND INNOVATION

DATE: 26/06/2018.....

PREFACE

Committee Mandate

The Departmental Committee on Communications, Information and Innovation is established under *Standing Order 216* whose mandate pursuant to the Standing Order 216 (5) is as follows;

- a. Investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned Ministries and departments;
- b. Study the programme and policy objectives of Ministries and departments and the effectiveness of the implementation;
- c. Study and review all legislation referred to it;
- d. Study, assess and analyze the relative success of the Ministries and departments as measured by the results obtained as compared with their stated objectives;
- e. Investigate and inquire into all matters relating to the assigned Ministries and departments as they may deem necessary, and as may be referred to them by the House;
- f. To vet and report on all appointments where the Constitution or any law requires the National Assembly to approve, except those under Standing Order 204 (*Committee on Appointments*);
- (fa) examine treaties, agreements and conventions;
- g. make reports and recommendations to the House as often as possible, including recommendation of proposed legislation;
- h. make reports and recommendations to the House as often as possible, including recommendation of proposed legislation;
- i. consider reports of Commissions and Independent Offices submitted to the House pursuant to the provisions of Article 254 of the Constitution; and
- j. Examine any questions raised by Members on a matter within its mandate.

In accordance with Second Schedule of the Standing Orders, the Committee is mandated to oversee Communication, Information, media and broadcasting (except for broadcast of parliamentary proceedings), Information Communications Technology (ICT) development and advancement of technology and modernization of production strategies.

Committee Membership

The Committee comprises of the following Members-

1. The Hon. Kisang William Kipkemoi, M.P - **Chairperson**
2. The Hon. George Macharia Kariuki, M.P - **Vice Chairperson**
3. The Hon. Liza, Chelule Chepkorir, M.P.
4. The Hon. Alfah, O. Miruka, M.P.
5. The Hon. Annie Wanjiku Kibeh, M.P.
6. The Hon. Joshua Kimilu, Kivinda, M.P.
7. The Hon. Marwa Kitayama Maisori, M.P.
8. The Hon. Mwambu Mabongah, M.P.
9. The Hon. Maritim Sylvanus, M.P.
10. The Hon. Mwangaza Kawira, M.P.
11. The Hon. Jonah Mburu, M.P.
12. The Hon. Gertrude Mbeyu Mwanyanje , M.P.
13. The Hon. Wamuchomba, Gathoni, M.P.
14. The Hon. (Eng.) Mark Nyamita Ogola, M.P
15. The Hon. John Kiarie Waweru, M.P.
16. The Hon. Erastus Nzioka Kivasu, M.P.
17. The Hon. Innocent Momanyi, Obiri, M.P.
18. The Hon. Godfrey Osotsi, Atieno , M.P.
19. The Hon. Anthony, Tom Oluoch, M.P.

Committee Secretariat

The secretariat comprises of-

- | | |
|----------------------------|-------------------------------------------------|
| 1. Mr. Nicholas Emejen | Deputy Director Committee Services (Lead Clerk) |
| 2. Ms. Ella Kendi | Third Clerk Assistant |
| 3. Mr. Ronald Walala | Legal Counsel II |
| 4. Ms. Lorna Okatch | Research Officer III |
| 5. Ms. Catherine Gati | Fiscal Analyst III |
| 6. Mr. Elijah Ichwara | Audio Officer |
| 7. Ms. Deborah Mepusi | Media Relations |
| 8. Mr. Wilson Angatangoria | Sergeant at arms |

CHAPTER ONE

INTRODUCTION

1.1 Background

1. The Copyright (Amendment) Bill, 2017 sponsored by the Leader of the Majority Party, the Hon. Aden Duale, MP, was read a first time on 28th September, 2017 and subsequently referred to the Departmental Committee on Communications, Information and Innovation for consideration and report to the House.
2. The Bill seeks to amend the Copyright Act, 2001 to domesticate provisions of the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired or Otherwise Print Disabled which came into force on 30th September 2016. The Bill further seeks to expand definitions under the Act, to restate provisions in the Act for better clarity, enhance penalties for willful infringement of copyright and to establish a Copyright Tribunal in place of the current “competent authority”.

2.2 Overview of the Bill

3. **Clause 2** of the Bill seeks to amend section 2 of the Act to—
 - (a) Change the definition of “author” in relation to an audiovisual work by deleting the word “film” and substituting therefor the word “work”;
 - (b) Change the definition of “author” in relation to a computer program by deleting the word “working” and substituting therefor the word “making”
 - (c) Broaden the definition of “infringing copy” to include the making of copies using any means;
 - (d) Broaden the definition of “musical work” to include sheet music;
 - (e) Introduce new definitions to, among others, cover formats of work accessible to visually impaired persons and define entities authorized to provide access to reading materials and information to visually impaired persons
4. **Clause 3** of the Bill seeks to amend section 5 of the Act to expand the functions of the Kenya Copyright Board to include coordination with regional Intellectual Property Organisations, licensing of all dealers of copyright work and enforcement of all copyright and related rights matters in Kenya.

5. **Clause 4** of the Bill seeks to amend section 6 of the Act to align the composition of the Kenya Copyright Boards with the titles used in the Constitution for the former Permanent Secretary and Commissioner of Police.
6. **Clause 5** of the Bill seeks to amend section 11 of the Act to change the appointing authority of the Executive Director from the Cabinet Secretary to the Board. The proposed amendment further enhances the qualifications for appointment as Executive Director. To be eligible for appointment, one has to be an Advocate of the High Court of at least seven (7) years' standing, up from the current five (5) years. Further, the person must possess at least seven (7) years' experience in copyright matters instead of the current five (5) years and they must have served in a senior position in a copyright office for at least five (5) years, instead of the current three (3). Lastly, such person must hold a Masters of Law degree in Intellectual Property.
7. **Clause 8** of the Bill seeks to amend section 22 of the Act to make literary works, musical works, artistic works, audiovisual works; sound recordings and broadcasts eligible for both copyright and related rights.
8. **Clause 9** of the Bill seeks to insert a new section 22A into the Act to obligate the Kenya Copyright Board to maintain a register of all copyright works and make the same available for search by the public.
9. **Clause 10** of the Bill seeks to repeal and replace section 26 of the Act to clarify the extent of copyright in literary, musical or artistic and audio-visual works and the limits to fair dealing in such works by persons other than the copyright holder.
10. **Clause 11** of the Bill seeks to insert new sections 26A, 26B, 26C and 26D in the Act. The new section 26A seeks to clarify the extent of copyright with regard to computer programs and the limits to fair dealing in such works by persons other than the copyright holder. The new section 26C seeks to exempt copyright material adapted for use by a visually impaired person from being deemed as infringing material. The proposed new section 26D seeks to protect "artist resale rights" with regard to the resale of copyrighted work. A royalty from the resale of the work is set at five percent (5%) of the net sale price for every item sold for Kshs. 20,000/- and above. Under the proposed new section,

resale of buildings, drawing plans, models, identical copies of artwork or manuscripts and items resold at a charity auction are exempted from the resale royalty.

11. **Clause 12** of the Bill seeks to amend section 28 of the Act to change the point at which the royalty levied on audio recording equipment and other material used for copying copyrighted works is payable from the first point of sale to the first point of manufacture or entry of the equipment or material.
12. **Clause 13** of the Bill seeks to repeal and replace section 29 of the Act for purposes of clarity.
13. **Clause 14** of the Bill seeks to amend section 30 of the Act to change the point at which the royalty levied on audio recording equipment and other material used for copying copyrighted works is payable from the first point of sale to the first point of manufacture or entry of the equipment or material.
14. **Clause 15** of the Bill seeks to insert a new section 30B into the Act to allow the Kenya Revenue Authority or other body designated by the Kenya Copyright Board to collect royalties on sound recordings on behalf of Collective Management Organizations (CMOs). Under the new section, CMOs for performers and producers and representatives of manufactures and importers of audio equipment are to agree on the rate of royalties applicable. In default of agreement by the parties, the Board is to set the rate. Additionally, the share of the collected royalties to be distributed to rights holders is to be determined by the Board.
15. **Clause 17** of the Bill seeks to amend section 33A of the Act to replace the “competent authority” with the Board as the body empowered to grant a licence for works not made available in the Kenyan market.
16. **Clause 18** seeks to amend section 35 of the Act to protect the rights of a producer of a sound recording.
17. **Clause 19** of the Bill seeks to insert new sections 35A, 35B and 35C in the Act. These outline provisions on protection of Internet Service Providers (ISPs) from liability for infringing material displayed by their subscribers. The new sections further provide for the rights and obligations of copyright holders with regard to takedown procedures of

infringing material by ISPs and the obligation of ISPs to provide information to investigative agencies on the identity of subscribers suspected of copyright infringement.

18. **Clause 20** of the Bill seeks to amend section 36 of the Act to empower the Court to order the destruction on infringing material upon conviction of an accused person.
19. **Clause 21** of the Bill seeks to amend section 38 of the Bill to enhance penalties for copyright infringement. For offences relating to infringing copies, the penalty is sought to be enhanced from a fine of four hundred thousand shillings or imprisonment for a term not exceeding ten years to a fine of five times the market value of the work or one thousand shillings for each infringing copy, whichever is higher. For offences relating to broadcasts, the amendments seek to enhance the penalty from a fine of one hundred thousand shillings or imprisonment for a term not exceeding two years to a fine of one million shillings or imprisonment for a term not exceeding five years, or both.
20. **Clause 22** of the Bill seeks to insert a new section 38A into the Act to define the extent of corporate liability for acts done in contravention of the Act. Under the new section, directors and employees of a company are equally liable for any acts of infringement.
21. **Clause 23** of the Bill seeks to amend section 43 of the Act to assign prosecuting authority to the Director of Public Prosecutions instead of the Attorney-General.
22. **Clause 24** of the Bill seeks to amend section 46 of the Act to change the terminology used from “collecting society” to “collective management organization”. The amendment also seeks to delete spent transitional provisions. It further requires the Kenya Copyright Board to observe due process before deregistering a CMO and criminalizes the act of collecting royalties without the approval of the Board. Collection without approval attracts a fine not exceeding five hundred thousand shillings or imprisonment for a term not exceeding four years, or both.
23. **Clause 25** of the Bill seeks to insert new sections 46B, 46C, 46D, 46E, 46F and 46G into the Act. The proposed new sections provide for the establishment, management and supervision of Collective Management Organisations (CMOs). To be elected a CMO director, one needs at least a one-month post-secondary qualification. Once elected, a director may only serve for two three-year terms. A person elected chairperson of a CMO

may only serve a single three-year term while the Chief Executive Officer of a CMO can only serve a single four-year term save where the CMO is newly established in which case the person may serve a further term with the approval of the Board.

24. Under the proposed new sections, the Executive Director of the Kenya Copyright Board may inspect CMOs and recommend remedial action or a forensic audit where appropriate. Where an audit or inspection report reveals acts contravening the Act, the Board may, among others, recommend the suspension or removal from office of an official or employee of a CMO, issue remedial directions, require the CMO to reconstitute its governing body, place the CMO under statutory management or revoke the CMO's license.
25. **Clause 26** of the Bill seeks to amend section 47 of the Act to change the terminology used from "collecting society" to "collective management organization".
26. **Clause 27** of the Bill seeks to amend section 48 of the Act to change the terminology used from "collecting society" to "collective management organization" and to replace the "competent authority" with the Copyright Tribunal as the dispute resolution body under the Act.
27. **Clause 28** of the Bill seeks to amend section 49 of the Act to empower the Attorney General to make regulations.
28. **Clause 29** of the Bill seeks to insert a new Schedule into the Act to outline the extent of fair dealing with regard to copyrighted work.

CHAPTER TWO

PUBLIC PARTICIPATION

2.1 Introduction

29. Pursuant to Article 118(1) (b) of the Constitution and Standing Order No. 127(3) which provides that the Parliament shall facilitate public participation, the Committee placed an advert in the local dailies on 6th February, 2018 and wrote to the key stakeholders inviting them to submit their views to the Clerk of the National Assembly on or before Tuesday 13th February, 2018.
30. By the deadline for submission, the Committee had received eighteen (18) memoranda from; Signs Media Kenya Limited, Record Industry Association of Kenya (RIAK), Phat! Intellectual Property (PHAT), Aga Khan University, Albert Gacheru Kiarie, Anjarwalla & Khanna, Kenya Association of Music Producers (KAMP), Creative Economy Working Group, MMC Africa Law (MMC), Moses Suywa Weche, Cornelious Omwitakho Netia, Andrew Opwoko Mumia, Multichoice Kenya Limited, Performers Rights Society of Kenya (PRISK), Irene Murugi Kariuki, International Public Lending Right Network, Association of Disc Jockeys East Africa and the Kenya Copyright Board (KECOBO).
31. The memoranda are numbered as Annexures four (4) to twenty one (21).

2.2 Committee Meetings

32. Upon receipt of the memoranda, the Committee held a total of eighteen sittings, five of which were held to hear oral submissions from Kenya Association of Music Producers, Creative Economy Working Group, MMC Africa Law, the Aga Khan University, Signs Media Kenya Limited, Multi choice Kenya Limited, Anjarwalla Khanna, Music Copyright Society of Kenya, Performers Rights Society of Kenya and Irene Murugi

2.3 Consideration of the Copyright (Amendment) Bill, 2017

33. In considering the Copyright Amendment Bill, 2017, the Committee took into account the Memoranda and oral submissions received from the public and its deliberations. The following constitutes the views of the Committee on the issues arising with regard to each Clause of the Bill—

Clause 2

34. Eight memoranda received by the Committee contained submissions relating to the Clause. Signs Media Kenya Limited proposed to amend the definition of “work” and “public performance” to extend to translations into sign language, and to cover “sign language gesturisation” respectively. The Committee disagreed with this view, noting that the provisions under the Act and as proposed by the Bill are adequate.
35. PHAT proposed that the terms “Technological Protection Measures” and “Computer Program” 26A be defined to give a concise and unambiguous meaning. The Committee agreed with the view of harmonizing the definition and use of the term “Technological Protection Measure”.
36. Aga Khan University proposed amendment of the definition of the terms “author” and “performer” to include reference to authors or performers of dramatic works. They further proposed a harmonization of the definition of the term “technical measure” and “technological protection measure” as used within the Bill and Act. Additionally, they proposed new definitions for the terms “choreographic work”; “circumvention”; “compilation” and “dramatic work”. The Committee agreed with the view of harmonizing the definition and use of the term “Technological Protection Measure” and the amendment of the Act generally to cover dramatic works.
37. Anjarwalla & Khanna proposed that the clause be amended to include a definition of the term “visual artist” as used in the proposed new section 26D of the Act, and that a clear distinction be made between the terms “visual art”, “artwork”, “artistic work” and “original work of art”. They further proposed that the proposed definition of the term “infringing copy” be amended to capture the infringing nature of the transmission proposed for regulation under the new paragraph (aa). The Committee agreed with the proposal relating to the definition of “infringing copy”.
38. KAMP proposed the amendment of the term “publication” to cover publications in the digital environment. The Committee agreed with this proposal.
39. CEWG proposed the insertion of a new definition of “artist”. They also proposed that the definition of the term “musical work” include the phrase “irrespective of musical quality and includes any graphical notation of such work and works composed for musical

accompaniment”. Further, they proposed retention of the definition of the term “broadcast” in the Act and amendment of the term “copy” to include an element of deliberateness. Additionally, they proposed a new definition for the term “technology protection measures”; amendment of the definition of “school” to cover educational institutions established under other Acts of Parliament or recognized under international obligations or instruments and deletion of the term “art market professional”. The Committee agreed with the proposals on the definition of “musical work” and “school”.

Clause 3

40. Three memoranda received by the Committee contained submissions relating to the Clause. CEWG proposed that the clause be amended by deleting paragraph (b) which empowers KECOBO to license all dealers of copyright works arguing that it may obstruct growth in copyrighted works. It was their further submission that section 5 of the Act be amended to empower KECOBO to administer the Protection of Traditional Knowledge and Cultural Expressions Act, 2016 and to set the term of office for Directors to three years, renewable once. Additionally CEWG were of the view that both directors and staff of KECOBO be required to refrain from positions of conflict of interest.
41. PHAT proposed the reworking of paragraph (b) as the requirement that KECOBO licenses all dealers of copyright work could have unintended consequences.
42. On their part, KECOBO agreed that the licensing of all dealers of copyright works would be onerous and would not grant a particular set of rights to licensed persons as opposed to unlicensed persons who could be the owners of the copyright works.
43. The Committee agreed with CEWG and KECOBO that the licensing of all dealers in copyright works would be an onerous task and noted that the clause would have to be amended accordingly.

Clause 4

44. CEWG proposed that the Clause be amended with regard to the membership of KECOBO by reducing the Directors (currently twenty-one) in line with *Mwongozo Principles* and that a generic reference be used with regard to the bodies to nominate members to the Board instead of naming existing organizations.

45. The Committee noted that the issue of streamlining the membership of the Board is currently before the House in the amendments proposed to the Act in the Statute Law (Miscellaneous Amendments) Bill, 2018. As such the issue would be dealt with comprehensively during its consideration of Statute Law (Miscellaneous Amendments) Bill, 2018.

Clause 5

46. Three memoranda received by the Committee contained submissions relating to the Clause. CEWG proposed that the Clause be amended to limit the tenure of the KECOBO Executive Director to three years, renewable once, in line with Mwongozo Principles. Further, they opposed the requirement of a Master of Laws degree in intellectual property for one to qualify for appointment as a non-inclusive requirement.

47. Albert Gacheru Kiarie opposed the amendment, arguing that an increase in the tenure of the Executive Director may lead to abuse of the office over a long period by an irresponsible appointee.

48. KECOBO submitted that the technical requirements of the job called for the Executive Director to possess legal qualifications and that they were not opposed to the qualifications as currently contained in the Act.

49. The Committee agreed with KECOBO that the technical nature of the job requires the Executive Director to have a legal background but noted that the qualification does not necessarily have to be a master's degree in law. As such, the clause would have to be amended to allow qualified persons an opportunity to be considered for the post.

Clause 6

50. The Committee agreed with the provisions of Clause 6. As at the time of concluding its report, the Committee had not received any memoranda with submissions relating to the Clause.

Clause 7

51. The Committee agreed with the provisions of Clause 7. As at the time of concluding its report, the Committee had not received any memoranda with submissions relating to the Clause.

Clause 8

52. Aga Khan University proposed amendment of the Clause to include dramatic works as part of works eligible for copyright. The Committee agreed with the proposal.

Clause 9

53. MMC Africa Law proposed amendment of the Clause to insert new provisions immediately after the proposed section 22A of the Act. The new sections are to provide clarity as to the rights that may be recorded in the register and to outline the process of application and registration of copyright. The Committee noted that the proposal contained procedural provisions which the Cabinet Secretary under the Act is empowered to make through regulations after consultation with the necessary stakeholders.

Clause 10

54. Albert Gacheru Kiarie proposed amendment of the proposed section 26(1) (e) and (f) of the Act to extend the nature of copyright to the communication, making available of or performance of a work in whole or substantial part either in its original form or in any form recognizably derived from the original, respectively. The Committee agreed with this submission to the extent of communication or making available of a work in public. With regard to the performance of a work in public, the Committee was of the view that the nature of that right is adequately covered under section 30 of the Act.
55. Aga Khan University proposed amendment of the Clause to extend its application to dramatic works and to delete the proposed section 26(10)(b) which is a repetition. The Committee agreed with the proposal.

Clause 11

56. Five memoranda received by the Committee contained submissions relating to the Clause. Signs Media Limited proposed the insertion of a new paragraph in the proposed section 26C (1) immediately after paragraph (b) to include an exemption for persons making cover versions of previously published audio-visual recordings for use by persons with hearing impairment. The Committee noted that the principal objective of the Bill was to implement the Marrakesh Treaty with regard to exempting materials adapted for Visually Impaired Persons. In its meeting with KECOBO it was further noted that the issue of materials adapted for persons with hearing disability is still under consideration

both at the local and international level and no consensus has been reached so far. Any amendment would therefore be premature.

57. CEWG proposed the insertion of the word “deliberate” immediately before the phrase “circumvention of technological measures” in the proposed new section 26B to cover innocent computer users who are compromised by third parties from being held liable for infringement. They further submitted that the Committee reconsider the introduction of the artist resale right proposed in the new section 26D as there is currently no universal consensus on the issue. It was their submission that the Committee should also consider the request by actors of a 2.5% resale rights to be collected from broadcasters by CMOs on their behalf. The Committee noted that the proposed amendment of section 26B is unnecessary as the proposed new section does not create an offence. With regard to the artist resale right, the Committee noted that the introduction of the right is meant to protect the most vulnerable persons in the copyright value chain. The proposal for a resale right for actors would pose a collection problem if introduced.
58. KAMP proposed amendments of the proposed new section 26B to extend its application to related rights. The Committee agreed with this submission.
59. PHAT submitted that the modalities of the implementation of the artist resale right were unclear. It was their further submission that the sale price cap of artwork above Kshs. 20,000/- needs revision as most artwork is currently sold and resold for less than that amount. The Committee noted that the proposed new section 26D allows for the licensing of a CMO for visual artists which will be best placed to collect the royalties surrounding the resale right and that the sale price cap was adequate.

Clause 12

60. KAMP proposed amendment of section 28(1) to introduce a new paragraph to include the making available of sound recordings as part of the acts that fall under the exclusive rights of a copyright owner. It was their further submission that the section be amended to have the blank tape royalty payable at the point of “sale, manufacture or importation” of blank media. With regard to the collection of the blank tape royalty, the Committee noted that the current provision requiring collection at the point of sale has not been operationalized. The Committee agreed with the proposal to introduce a new paragraph to

include the making available of sound recordings as part of the acts that fall under the exclusive rights of a copyright owner but noted that with regard to the blank tape royalty, proposal in the Bill covering both manufacture and importation is adequate.

Clause 13

61. CEWG proposed the deletion of the proposed section 29(c) relating to broadcasts and to retain the current definition of the term “broadcast”. The Committee disagreed with this view.

Clause 14

62. The Committee agreed with the provisions of Clause 14. As at the time of concluding its report, the Committee had not received any memoranda with submissions relating to the Clause.

Clause 15

63. Seven memoranda received by the Committee contained submissions relating to the Clause. CEWG proposed amendment of the proposed new section 30B to delete the reference to the Kenya Revenue Authority (KRA) as the collector of royalties on behalf of CMOs. It was their further submission that the Committee considers reinstating the former section 30A of the Act on the equitable remuneration for performers which was deleted by the Statute Law (Miscellaneous Amendments) Act, 2017.
64. KAMP also opposed the imposition of KRA as a collector of royalties and proposed the deletion and replacement of the proposed new section 30B in that regard. It was their further proposal that the proposed new section 30B (4) be amended to allow the share of the blank tape royalty among the respective right-holders be agreed by their respective CMOs instead of the same being left at the discretion of KECOBO. The Committee noted that leaving the agreement on sharing of the royalty to CMOs is imprudent as they may never agree to the detriment of artists. Further, KECOBO is best placed to determine the share as all the right-holders are represented in it.
65. Albert Gacheru Kiarie, Moses Suywa Weche, Cornelious Omwitakho Netia and Andrew Opwoko Mumia submitted against the reintroduction of the old section 30A of the Act, noting that the section was declared unconstitutional by the Malindi High Court for lack of public participation. It was the further submission of Mr. Mumia that the KRA has no

mandate to collect revenue for private individuals and any attempt to have them do so is unconstitutional.

66. PHAT submitted that the Bill is not clear on the modalities of the collection and distribution of the Blank Tape royalty.
67. The Committee noted that the collection and distribution of the Blank tape royalty has been a contentious issue since the enactment of the provision. The current provision requires collection at the point of sale which has proven problematic as traders rarely document sales of blank media for purposes of its collection. The Bill proposes that the royalty be levied at the first point of manufacture or entry of such media in the country which the KRA is best placed to implement. In any event, the proposed section 30B provides an alternative for CMOs if they are of the view that the KRA is not a viable option.
68. With regard to the issue of the old section 30A of the Act, the Committee also noted that the issue of the reintroduction of the equitable remuneration for performers was not part of the Bill as published. Given its contentious nature which led to it being litigated in Court by competing right-holders, it would be imprudent to reintroduce it without extensive deliberation with and among the various stakeholders.

Clause 16

69. Five memoranda received by the Committee contained submissions relating to the Clause. MMC Africa Law submitted that the Clause be amended in the proposed amendments to section 33(3) to require that parties to an assignment of copyright appear before an Advocate of the High Court to have the nature of the agreement proposed to be entered into explained to them and witnessed.
70. Moses Suywa Weche, Cornelious Omwitakho Netia and Andrew Opwoko Mumia proposed the deletion of paragraph (c) of the Clause which renders an assignment invalid unless it is lodged with the KECOBO. It was their contention that the provision takes away the right of artists to contract with whomever they choose.
71. PHAT submitted that the wording of paragraph (c) of the Clause which renders an assignment invalid unless it is lodged with the KECOBO is problematic given that

registration of copyright is voluntary in the first place. It was their proposal that KECOBO establish a free or affordable assignment registry instead.

72. The Committee noted that the Bill came about as a result of artists complaints of assignment of their rights without full understanding of the implication. Given the asymmetrical relationship in most instances between the artists and persons or companies proposing to purchase their rights, the Committee noted that it would be prudent to have any assignments registered for purposes of proof.

Clause 17

73. Three memoranda received by the Committee contained submissions relating to the Clause. Moses Suywa Weche, Cornelious Omwitakho Netia and Andrew Opwoko Mumia proposed the deletion of the clause arguing that the proposals in the clause take away their rights as artists to contract with whomever they choose. The Committee disagreed with this view as the Clause relates to the granting of a license by KECOBO to applicants seeking to distribute a work withheld from the Kenyan market.

Clause 18

74. Aga Khan University proposed an inclusion of a further amendment in the Clause to amend section 35 of the Act to replace the term “technical measure” with the term “technological protection measure” and to include dramatic works as part of the works covered by the section. The Committee agreed with this submission.

Clause 19

75. Four memoranda received by the Committee contained submissions relating to the Clause. CEWG proposed amendments to the proposed section 35A(1) to protect an Internet Service Provider (ISP) from hoax, vexatious and baseless requests to remove infringing content where the person requesting has no legal basis. It was their further submission that the proposal under the Bill which requires that ISPs comply with a take-down notice within forty-eight hours turns them into arbiters and may drag them into copyright ownership and infringement disputes. They proposed an intermediate step between the notice by the copyright owner and the action by the ISP requiring the copyright owner to obtain a court order requiring the ISP to disable access to infringing content. They further proposed amendments to the proposed new section 35B(1) to require a copyright owner to specify all web addresses and URLs that uniquely identify

infringing material to prevent overbroad and non-specific take-down requests. Additionally, it was their submission that the period of forty-eight hours for effecting the takedown notices is unfair and unworkable for ISPs and that they should be allowed to take down alleged infringing material expeditiously. They further proposed that other persons apart from those accused of infringement should be allowed to file a counter-notice as the notice sent to an ISP may identify the wrong person. The Committee agreed with the proposal of other persons being allowed to file counter-notices. Additionally, the Committee noted that forty-eight working hours would be a sufficient period within which an ISP should effect a valid take-down notice.

76. Multichoice Kenya Limited proposed the addition of a new section 35C (3) to provide for automated removal of content on an urgent basis in response to notices by verified entities including the National Police Service. It was their further proposal that the Clause be amended to insert a new section 35D into the Act to allow a right-holder to move the Court for the grant of an order to pre-emptively block servers hosting illegal streams prior to a live event. The Committee agreed with the proposal for a pre-emptive take-down of content as it would be subject to a court process.
77. Anjarwalla and Khanna proposed the amendment of the proposed new section 35B to include a process for notifying the alleged infringer of copyright to allow them time to respond to a takedown notice. The Committee agreed with this submission.
78. Aga Khan University proposed an amendment to the Clause to allow persons affected by a takedown notice to file an opposition within fourteen days and the ISP to thereafter either reject or accede to the opposition within seven days. The Committee disagreed with this proposal as it would convert an ISP into an arbiter of a copyright dispute best dealt with by the Copyright Tribunal or the Court.

Clause 20

79. The Committee agreed with the provisions of Clause 20. As at the time of concluding its report, the Committee had not received any memoranda with submissions relating to the Clause.

Clause 21

80. Two memoranda received by the Committee contained submissions relating to the Clause. KAMP proposed an amendment to section 38 to cover digital copies of copyright material and to restrict the application of the penalties prescribed under subsections (4) and (5) to particular offences. The Committee notes that definition of the term “copy” under the Act covers both physical and digital copies and that the penalties provided for under subsections (4) and (5), subject to minor amendment, apply to offences related to illegal copies and illegal transmission of broadcast, respectively.
81. Aga Khan University proposed the insertion of a new subsection immediately after section 38(4) of the Act on statutory damages in lieu of actual damages. It was their proposal that persons who do not register their copyright should not be awarded statutory damages as an incentive to encourage registration of copyright. The Committee disagreed with the proposal as the underlying premise of copyright registration is its voluntary nature.

Clause 22

82. The Committee agreed with the provisions of Clause 22 save for amendment to recast its wording. As at the time of concluding its report, the Committee had not received any memoranda with submissions relating to the Clause.

Clause 23

83. The Committee agreed with the provisions of Clause 23. As at the time of concluding its report, the Committee had not received any memoranda with submissions relating to the Clause.

Clause 24

84. Four memoranda received by the Committee contained submissions relating to the Clause. MMC proposed that the proposed new section 46(9) and (10) of the Act be amended to allow publication of the deregistration of a CMO in a daily newspaper of national wide circulation and to allow members of a CMO to make representations in response to a notice by KECOBO. The Committee agreed with this view as there may be an instance where a CMO is not working in the best interests of its members and members’ representations would be necessary.

85. CEWG proposed the deletion of the phrase “where administrative shortfalls are apparent” in the proposed section 46(3A) as a condition for the grant of a provisional license and its replacement with “or where the Board in its discretion finds that the requirements of the Act have not been fully complied with”. It was their further submission that the proposed section 46(11) be amended to specify graduated sanctions and an appeal process for CMOs. The Committee disagreed with both views as the wording used in the Bill allows the Board sufficient discretion and the sanction of deregistration is final in nature.
86. Albert Gacheru Kiarie submitted that section 46 of the Act should be amended to provide that the KECOBO should be satisfied that a CMO has the authority of the right-holders it intends to collect for before it is issued with a license. It was his further proposal that more than one CMO may be registered for a particular category of rights but only one may be licensed to collect at any given time. The Committee agreed with the proposal that KECOBO be satisfied that an entity has the authority of right-holders before registering it as a CMO. The Committee disagreed with the second proposal as it would negatively affect the freedom of association of right-holders desirous of mandating a CMO of their choice to collect royalties on their behalf.
87. RIAK submitted that the role of KECOBO should be limited to licensing and supervision of CMOs and not micromanagement. The Committee noted that the regime proposed under the Bill is not invasive and is mainly in response to the issues raised by right-holders on the (mis)management of CMOs. It does not amount to micromanagement.

Clause 25

88. Two memoranda received by the Committee contained submissions relating to the Clause. MMC proposed an amendment to the proposed section 46B of the Act to delete the words “or any other post-secondary qualification obtained after a period of at least one-month study” to increase the threshold for qualifications of directors of a CMO. They further proposed amendment of the proposed section 46C to allow CMOs to distribute royalties accruing jointly to right-holders.
89. Additionally, MMC proposed that the proposed section 46D be amended to insert a definite percentage of the number of members that failure to account to by a CMO could lead to an inspection and to clarify that the failure to comply with a request for

information or records relates to the Board or the Members. On the proposed section 46G, they proposed an amendment to make it mandatory for KECOBO members to attend the CMO Board meetings. They further proposed additional provisions to cater for extended collective management schemes, ability of right-holders to pick and choose which rights to assign to more than one CMO, and the execution of agreements between right-holders and CMOs before they become members. The Committee noted that a post-secondary qualification from a recognized institution is an adequate minimum qualification for appointment as a director of a CMO. In any event, members may opt to choose persons with higher credentials. On the issue of inserting the word “jointly” the Committee noted that this could introduce confusion and the question of joint management, collection and distribution of royalties be left to agreement between the various CMOs and their members. The Committee agreed that the use of the term “significant number” is ambiguous and noted that failure to account to at least twenty percent of members constitutes grounds for the inspection of a CMOs books. The Committee was in further agreement that the failure to provide information or records that warrants grounds for an inspection should relate to a request from KECOBO or members of a CMO. The Committee disagreed with the proposal to make attendance of KECOBO members to CMO Board meeting mandatory as it could lead to conflict of interest and stretch the available KECOBO staff and resources. The Committee was of the view that the proposal to provide for extended collective management schemes unduly fetters artists freedom of association.

90. CEWG proposed the deletion of the proposed section 46B(1) arguing that the terms of service of the Chief Executive Officer of a CMO should be determined by the CMO Board and not KECOBO. It was their further proposal that CMO directors serve for a renewable three-year term in line with *Mwongozo Principles* and that section 46B(4) on the term of service for the Chief Executive Officer be deleted for being uncertain and unpredictable. Additionally, they sought the introduction of new provisions requiring the publication of information on CMO collections and distributions. The Committee noted that section 46B does not empower KECOBO to determine the terms of service of the Chief Executive Officer of a CMO. The Committee agreed with the submissions to have CMO directors serve for a renewable three-year term and that the same apply to the term

of the Chief Executive Officer. The Committee was further agreeable to the annual publication of information on CMO collections and distributions.

Clause 26

91. The Committee agreed with the provisions of Clause 26. As at the time of concluding its report, the Committee had not received any memoranda with submissions relating to the Clause.

Clause 27

92. CEWG proposed that the clause be amended to expressly state the mandate of the Tribunal to include the arbitration of disputes between right-holders and to ensure that the tribunal is aligned with the Constitution and meets the test of fairness. The Committee agreed with the proposal that the mandate of the Tribunal include the arbitration of disputes between right-holders and noted that the Act needed to be amended to ensure that the Tribunal is domiciled in the Judiciary as contemplated under Article 169(1)(d) of the Constitution.

Clause 28

93. The Committee agreed with the provisions of Clause 28. As at the time of concluding its report, the Committee had not received any memoranda with submissions relating to the Clause.

Clause 29

94. Two memoranda received by the Committee contained submissions relating to the Clause. CEWG proposed an amendment to the proposed new Second Schedule to include the jurisprudence of the Supreme Court of Kenya in the “Digital Migration” Case on the factors which constitute fair dealing of copyright works. The Committee noted that the reasonableness of the Court decision, the proposed Second Schedule provides an adequate general guideline on fair use exemptions and any allegation of infringement would have to be proven in a case by case basis.
95. Multichoice Kenya Limited proposed an amendment to the proposed new Second Schedule to include exemptions allowing circumvention of technological protection measures. The Committee disagreed with the proposal as the Act and the proposals under the Bill only allow circumvention for purposes of fair use.

Additional proposals

96. Eleven memoranda received by the Committee contained submissions on additional proposals not covered under the Bill. These proposals included—

- (a) amendment of the Act to reintroduce an equitable remuneration right for performers and producers of sound recordings and audio-visual works;
- (b) amendment of the Act to introduce the use of a digital rights management system to ensure transparency in the collection and sharing of royalties;
- (c) amendment of section 42 of the Act to remove the power of KECOBO Officers to arrest persons for cognizable offences and hand them over to the police;
- (d) amendment of section 4 of the Act to require KECOBO to establish offices in all the Counties;
- (e) amendment of section 8 of the Act to require the conduct of the business and affairs of KECOBO to be done in line with the highest standards of ethics, integrity and good conduct;
- (f) amendment of section 9 of the Act to require the publication of the salaries and remuneration of KECOBO Members
- (g) amendment of section 19 of the Act to require the publication of KECOBO's accounts;
- (h) amendment of the Act to delete all references to the “Competent Authority” and replace them with the “Copyright Tribunal” as proposed in the Bill;
- (i) amendment of section 38 of the Act to ensure that all fines recovered with regard to a contravention of the Act be paid to the general revenue of Kenya;
- (j) amendment of the Act to prohibit payments by content promoters to broadcasters in return for favorable airplay;
- (k) amendment of the Act to provide for mandatory minimum contractual terms;
- (l) amendment of the Act to provide for a public lending right system;
- (m) amendment of the Act to de-criminalize the compilation and distribution of DJ Mixes;

- (n) amendment of the Act to extend the liability of an ISP to the blocking of Virtual Private Networks;
- (o) amendment of the Act to cater for dramatic works, in general;
- (p) amendment of the Act to provide for the delivery of one copy of a published book or newspaper to public libraries by a local publisher at their own expense;
and
- (q) repeal and re-enactment of the Act.

The Committee noted that majority of the additional proposals are adequately covered under the Act. The proposal for the delivery of books and newspapers to public libraries was noted as being adequately covered by the provisions of sections 6, 7 and 8 of the Books and Newspapers Act, Cap. 111.

The Committee further noted that the Act has been amended piecemeal since its enactment in 2001 and there is need for comprehensive stakeholder discussions on its eventual repeal and re-enactment for purposes of consistency and currency of its provisions. This discussion would resolve the conflicting views held by stakeholders on matters such as the equitable remuneration right.

Presently, and in response to the additional proposals, the Committee noted that there would be need to amend the Act to:

- (a) provide for the introduction of a rights management system through regulations;
- (b) delete all references to the “Competent Authority” and replace them with the “Copyright Tribunal”; and
- (c) to cater for dramatic works, in general.

CHAPTER THREE

COMMITTEE RECOMMENDATIONS

1. In light of the submissions in the Memoranda, the oral representations made before the Committee and the Committee deliberations on the Bill, the Committee recommends—

CLAUSE 2

THAT, clause 2 of the Bill be amended—

- (a) by deleting paragraph (a) and substituting therefor the following new paragraph—

“(a) in the definition of author by—

- (i) inserting the word “dramatic” immediately after the word “musical” appearing in paragraph (a);
- (ii) deleting the word “film” appearing in paragraph (d) and substituting therefor the word “work”;
- (iii) deleting the word “working” appearing in paragraph (h) and substituting therefor the word “making”;

- (b) in paragraph (e) by deleting the word “forklore” and substituting therefor the word “folklore”;

- (c) in paragraph (f)(ii) by inserting the words “which constitutes an infringement of any rights protected by this Act” immediately after the words “a work or live performance” appearing in the proposed paragraph (aa);

- (d) in paragraph (g) by deleting the proposed new definition of “musical work” and substituting therefor the following new definition—

“musical work” means a work consisting of music, irrespective of musical quality, and includes a graphical notation of such work and works composed for musical accompaniment”

- (e) by deleting paragraph (j) and substituting therefor the following new paragraph—

“(j) by deleting the definition of “school” and substituting therefor the following new definition—

“school” means an institution registered or accredited under the Universities Act, 2012, the Basic Education Act, 2013 or the Technical and Vocational Education and Training Act, 2013”;

(f) In paragraph (k) in the proposed new definition of work by inserting the word “dramatic” immediately after the word “artistic”;

(g) by deleting paragraph (l) and substituting therefor the following new paragraph—

“(l) by deleting the definition of “technical measure” and substituting therefor the following new definition—

“technological protection measure” means any device, product or component incorporated into a work that effectively prevents or inhibits the infringement of any copyright or related right”;

(h) by inserting the following new paragraphs immediately after paragraph immediately after paragraph (l)—

“(m) by inserting the following new definitions in their proper alphabetical sequence—

“accessible format copy” means a copy of a work in an alternative manner or form which gives a beneficiary person access to the work, including permitting the person to have access as feasibly and comfortably as a person without visual impairment or other print disability;

“art market professional” includes an auctioneer, owner or operator of a gallery, museum, an art dealer or any other person involved in the business of dealing in artworks;

“artwork” means an original work of visual art created by an artist or artists, or produced under their authority;

“authorized entity” means an entity that is authorized or recognized by the government to provide education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit basis and includes a government institution or non-profit organization that

provides the same services to beneficiary persons as one of its primary activities or institutional obligations;

“beneficiary person” means a person who—

- (a) is blind;
- (b) has a visual impairment or a perceptual or reading disability which cannot be improved to give visual function substantially equivalent to that of a person who has no such impairment or disability and so is unable to read printed works to substantially the same degree as a person without an impairment or disability; or
- (c) is otherwise unable, through physical disability, to hold or manipulate a book or to focus or move the eyes to the extent that would be normally acceptable for reading, regardless of any other disabilities;

“buyer” means a person to whom ownership is transferred in an artwork under commercial resale;

“commercial resale” means the subsequent re-transfer of ownership in artwork from one person to another for monetary consideration with the involvement of an art market professional;

“Copyright Tribunal” means the tribunal established under section 48 of the Act;

“exclusive licence” means a licence in writing signed by or on behalf of an owner or prospective owner of copyright or related rights, authorizing the licensee to the exclusion of all other persons, including the person granting the licence, to exercise a right which by virtue of this Act would apart from the licence be exercisable exclusively by the owner of copyright or related rights;

“information system” means a system for generating, sending, receiving, storing, displaying or otherwise processing data and includes

internet;

“information system services” includes the provision of connections, the operation of facilities for information systems, the provision of access to information systems, the transmission or routing of data between or among points specified by a user and the processing and storage of data, at the individual request of the recipient of the service;

“Internet Service Provider” means a person providing information services, systems, or access software that provides or enables computer access by multiple users to a computer server including connections for, the transmission or routing of data;

“collective management organisation” means an organisation approved and authorized by the Board which has as its main object, or one of its main objects, the negotiating for the collection and distribution of royalties and the granting of licenses in respect of the use of copyright works or related rights;

“owner of the copyright” means the first owner, an assignee or an exclusive licensee, as the case may be, of the relevant portion of the copyright;

“performance” means the representation of a work by such action as dancing, playing, reciting, singing, declaiming or projecting to listeners by any means whatsoever;

“performer” means an actor, singer, declaimer, musician or other person who performs a literary, musical or dramatic work or a work of folklore and includes the conductor of the performance of any such work;

“public display” means the showing of original or a copy of a work—

- (a) directly;
- (b) by means of a film, slide, television image or otherwise on screen;

- (c) by means of any other device or process;
- (d) in the case of an audio-visual work, showing of individual images consequentially at a place or places where persons outside the normal circle of a family and its closest social acquaintances are or can be present irrespective of whether they are or can be present at the same place and time or at different places or times, where the work can be displayed without communication to the public;

“publication” means a work or a sound recording, copies of which have been made available to the public in a reasonable quantity for sale, rental, public lending or for other transfer of the ownership or the possession of the copies:

Provided that, in the case of a work, the making available to the public took place with the consent of the author or other owner of copyright, and in the case of a sound recording, with the consent of the producer of the sound recording or his successor in title;

“public performance” means—

- (a) in the case of work other than an audio-visual work, the recitation, playing, dancing, acting or otherwise performing the work, either directly or by means of any device or process;
- (b) in case of an audio-visual work, the showing of images in sequence and the making of accompanying sound audible; and
- (c) in the case of a sound recording, making the recorded sounds audible at a place or at places where persons outside the normal circle of the family and its closest acquaintances are or can be present, irrespective of whether they are or can be present at the same place and time, or at different places or times, and where the performance can be perceived without the need for communication to the public;

“record” means any device in which sounds or the representations of sounds are embodied which are capable of reproduction there from with or without the aid of another instrument;

“related rights” mean rights neighboring on copyright, including those subsisting under sections 27(2), 28, 29 and 30 of this Act;

“resale royalty right” means the right of artist or group of artists or successors to receive resale royalty on commercial resale of an artwork;

“seller” means the person who transfers ownership of the artwork under commercial resale; and

“specialized formats” means Braille, audio, or digital text or any other media which is exclusively for use by visually impaired or other persons with disabilities, and with respect to print instructional materials, includes large print formats when such materials are distributed exclusively for use by visually impaired or other persons with disabilities.

(n) by deleting the definition of “competent authority””

Justification:

1. To include dramatic works as part of the works covered by copyright under the Act;
2. To correct a typographical error;
3. To delete the definition of “technical” measure” and substitute with the definition of “technological protection measure” for purposes of consistency with the proposals in the Bill and the existing provisions in the Act;
4. To delete the definition of “organization” and substitute with the definition of “collective management organization” for purposes of clarity and consistency with the proposals in the Bill;
5. To delete the definition of “original work of art” which is unnecessary;
6. To amend the definition of “publication” to apply to intangible works as well; and

7. To amend the Act to delete the definition of “competent Authority” in line with the proposals in the Bill to change it into a Copyright Tribunal.

CLAUSE 3

THAT, clause 3 of the Bill be amended by deleting paragraph (b);

Justification:

To delete the proposed requirement that the Board register all dealers of copyright which is an impossible task.

CLAUSE 5

THAT, clause 5 of the Bill be amended—

(a) in paragraph (a) by inserting the words “through a competitive process” immediately after the words “appointed by the Board” appearing in the proposed new subsection 11(1);

(b) by deleting paragraph (b) and substituting therefor the following new paragraph—
“(b) by deleting subsection (2) and substituting therefor the following new subsection—

“(2) A person shall qualify for appointment under this section if he or she—

(a) is as an advocate of the High Court of Kenya of not less than five years’ standing or has held judicial office in Kenya;

(b) has at least five years managerial experience; and

(c) has at least five years’ experience in matters relating to copyright and other related rights”

Justification:

1. To ensure that the Executive Director is recruited through a competitive process;
and

2. To introduce reasonable the qualifications for appointment as Executive Director i.e. one has to be an advocate of the High Court of not less than five years standing with at least five years' managerial experience and experience in copyright matters. This is due to the technical nature of copyright.

CLAUSE 8

THAT, the Bill be amended by deleting clause 8 and substituting therefor the following new clause—

Amendment of section 22 of No. 12 of 2001. **8.** Section 22 of the principal Act be amended in subsection (1) by—

- (a) inserting the words “or related rights” immediately after the word “copyright” in the opening statement;
- (b) inserting the following new paragraph immediately after paragraph (c).

“(ca) dramatic works”

Justification:

To amend the Act to cover dramatic works under copyright and related rights.

CLAUSE 10

THAT, clause 10 of the Bill be amended in the proposed new section 26 by deleting subsection (1) and substituting the following new subsection—

(1) Copyright in a literary, musical, artistic, dramatic or audio-visual work shall be the exclusive right to control the doing in Kenya of any of the following acts—

- (a) the reproduction in any material form of the original work;

- (b) the translation or adaptation of the work;
- (c) the distribution to the public of the work by way of sale, rental, lease, hire, loan, importation or similar arrangement;
- (d) the communication to the public of the whole work or a substantial part thereof, either in its original form or in any form recognizably derived from the original;
- (e) the making available of the work of the whole work or a substantial part thereof, either in its original form or in any form recognizably derived from the original; and
- (f) the broadcasting of the whole work or a substantial part thereof, either in its original form or in any form recognizably derived from the original.

Justification:

To insert missing words in paragraph (1) (d) and (e) of the proposed new section 26 of the Act.

CLAUSE 11

THAT, clause 11 of the Bill be amended—

- (a) In the proposed new section 26C(1) by deleting paragraph (b) and substituting therefor the following new paragraph—

“(b) to make, import, distribute, lend or share accessible format copies by a beneficiary person or authorized entities or persons acting on behalf of a beneficiary person, including the circumvention of any technological protection measures that may be in place, subject to the terms and conditions set out under Regulations.”

- (b) In the proposed new section 26D by—

- (i) inserting the word “of” immediately after the word “work” appearing in subsection (1);
- (ii) deleting subsection (4) and substituting therefor the following new subsection—

“(4) The resale royalty shall be payable at the rate of five percent of the net sale price on the commercial resale of an artwork and the seller, the art market professional, the seller’s agent and the buyer shall be jointly and severally liable to pay the resale royalty.”

Justification:

To correct typographical errors and insert missing words.

CLAUSE 12

THAT, clause 12 of the Bill be amended—

- (a) by deleting paragraph (a) and substituting therefor the following new paragraph—

“(a) in subsection (1) by inserting the following new paragraph immediately after paragraph (b)—

“(ba) the making available of the sound recording in whole or in part either in its original form or in any form recognizably derived from the original.””

- (b) by inserting the following new paragraph immediately after paragraph (a)—

“(aa) by deleting subsection (3) and substituting therefor the following new subsection:

“(3) The rights of an owner of a copyright in a sound recording are not infringed by the making of a single copy of the recording for the personal and private use of the person making the copy; and in respect of such use the owner of copyright in the sound recording shall have the right to receive fair compensation consisting of a royalty levied on audio recording equipment or audio blank tape

suitable for recording and other media intended for recording, payable at the point of first manufacture or entry in Kenya by the manufacturer or importer for commercial purposes of such equipment or media.””;

Justification:

1. To amend section 28(1) of the Act to introduce a new paragraph to include the making available of sound recordings as part of the acts that fall under the exclusive rights of a copyright owner;
2. To correct the proposed amendment to section 28(3) to align it with the proposed deletion of subsections (4) and (5).

CLAUSE 15

THAT, clause 15 of the Bill be amended in the proposed new section 30B by—

- (a) inserting the word “royalties” immediately after the word “collect” appearing in subsection (1);
- (b) inserting the word “the” immediately after the words “recordings and” appearing in subsection (3);
- (c) deleting subsection (4) and substituting therefor the following new subsection—

“(4) The Board shall determine and, by notice in the Gazette, publish the share of the private copying remuneration applicable to the respective rights holders.”

Justification:

1. To correct typographical errors; and
2. To require the Board to determine and publish the shares of the Blank tape levy that the producers and performers of sound recordings will be entitled to.

CLAUSE 17

THAT, clause 17 of the Bill be amended by inserting the following new paragraph immediately after paragraph (a)—

“(aa) in subsection (2) by deleting the words “competent authority” appearing immediately after the words “conditions as the” and substituting therefor the word “Board”;

Justification:

To delete the reference to the “competent authority” in section 33A of the Act and replace it with the “Board” which was left out in the proposals contained in the Bill.

CLAUSE 18

THAT, Clause 18 of the Bill be amended—

(a) by deleting paragraph (a) and substituting therefor the following new paragraph—

“(a) by deleting subsection (1) and substituting therefor the following new subsection—

“(1) Copyright or related rights shall be infringed by a person who, without the license of the owner of the copyright or related rights—

(a) does, or causes to be done, an act the doing of which is controlled by the copyright or related rights; or

(b) imports, or causes to be imported, otherwise than for his private and domestic use, an article which he knows to be an infringing copy.”

(b) by inserting the following new paragraphs immediately after paragraph (b)—

“(c) in subsection (3) by deleting the word “technical” wherever it appears and substituting therefor the words “technological protection”

(d) in subsection (9) by inserting the word “dramatic” immediately after the word “literary”;

(e) in subsection (11) by inserting the word “dramatic” immediately after the word “musical”;

Justification:

1. To correct an omission in the proposed amendment to section 35(1) of the Act;
2. To delete the word “technical” and replace it with the words “technological protection” to align it with the proposed new definition of “technological protection measures”; and
3. To amend the Act to cover dramatic works under copyright and related rights.

CLAUSE 19

THAT, clause 19 of the Bill be amended—

(a) in the proposed new section 35A(1)(c)(iii) by inserting the word “business” immediately after the words “forty eight”;

(b) in the proposed new section 35B by—

(i) inserting the following new subsection immediately after subsection (3)—

“(3A) An Internet Service Provider shall, upon receipt of a valid takedown notice, notify the person responsible for making available the alleged infringing content and provide them with a copy of the notice as soon as is practicable.”

(ii) deleting subsection (4) and substituting therefor the following new subsection—

“(4) An Internet Service Provider shall disable access to the material within forty eight business hours unless it receives a counter notice fulfilling the requirements set out for a takedown notice and contesting the contents of the takedown notice.

(iii) deleting the word “The” appearing in subsection (5) and substituting therefor the word “An”;

(iv) deleting subsection (6) and substituting therefor the following new subsection—

“(6) An Internet Service Provider which contravenes the provisions of subsection (4) commits an offence and shall, upon conviction, be liable to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding five years, or to both.”

- (v) deleting the word “of” appearing in subsection (7) and substituting therefor the words “not exceeding”
- (vi) deleting the word “The” appearing in subsection (8) and substituting therefor the word “An”;
- (vii) by inserting the following new section immediately after the proposed new section 35C—

Application for
injunction.

35D. (1) A person may apply to the High Court for the grant of interim relief where he or she has reasonable grounds to believe that his or her copyright is being or may be infringed by a person situated in or outside Kenya.

(2) The High Court may, upon application under subsection (1), grant an order requiring—

- (a) a person enabling or facilitating the infringement of copyright, or whose service is used by another person to infringe copyright, to cease such enabling or facilitating activity or disable that person’s access to its service for the infringing purpose;
- (b) a person hosting or making available an online location, service or facility situated in or outside Kenya which is used to infringe copyright or which enables or facilitates the infringement of

copyright, to disable access to such online location, service or facility as replaced, amended or moved from time to time; or

- (c) an internet service provider to prevent or impede the use of its service to access an online location, service or facility situated in or outside Kenya that is used to infringe copyright as replaced, amended or moved from time to time.

Justification:

1. To amend the proposed new sections 35A and 35B to require an ISP to disable access to infringing copies within forty-eight business hours of receiving a take-down notice;
2. To amend the proposed new sections 35B to require an ISP to notify an alleged infringer upon receipt of a valid take-down notice;
3. To amend the proposed new sections 35B to allow any person to file a counter-notice to a takedown notice;
4. To correct typographical errors;
5. To allow a person to apply to the High Court for the grant of an injunction especially with regard to live events.

CLAUSE 21

THAT, clause 21 of the Bill be amended—

(a) by deleting paragraph (a) and substituting therefor the following new paragraph—

“(a) by deleting subsection (1) and substituting therefor the following new subsection—

(1) A person who, at a time when copyright or the right of a performer or producer subsists in a work, knowingly-

(a) makes for sale or hire an infringing copy;

- (b) sells or lets for hire or by way of trade, exposes or offers for sale an infringing copy;
- (c) distributes infringing copies;
- (d) possesses otherwise than for his private and domestic use, an infringing copy;
- (e) imports into Kenya otherwise than for his or her private and domestic use an infringing copy;
- (f) makes or has in his or her possession a contrivance used or intended to be used for the purpose of making an infringing copy;
- (g) causes a broadcast to be rebroadcast or transmitted in a diffusion service, knowing that copyright subsists in the broadcast and that such rebroadcast or transmission constitutes an infringement of the copyright;
- (h) causes a program carrying signals to be distributed by a distributor for whom they were not intended, knowing that copyright subsists in the signals and that such distribution constitutes an infringement of the copyright;
- (i) circumvents a technological protection measure or manufactures or distributes devices designed for circumventing technological protection measures; or
- (j) removes or alters rights management information or imports or distributes, or makes available to the public a copy of a work from which electronic rights management information has been removed or altered,

commits an offence.”;

- (b) in paragraph (c) by deleting the proposed new subsection (4) and substituting therefor the following subsection:

“(4) A person convicted of an offence under subsection (1) (a), (b), (c), (d) or (e) shall be liable to:

- (a) in the case of a first conviction, a fine of five times the market value of the legitimate work or one thousand shillings for each infringing copy whichever is higher or to imprisonment for a term not exceeding ten years, or to both; and
- (b) in any other case to a fine of ten times the market value of the legitimate work or two thousand shillings for each infringing copy, whichever is higher or imprisonment for a term not exceeding twenty years, or to both.”
- (c) in paragraph (d) by deleting the words “Any person guilty” appearing in the proposed new subsection (5) and substituting therefor the words “A person convicted”;
- (d) by deleting paragraph (e) and substituting therefor the following new paragraph—
 - “(e) by deleting subsection (6).”
- (e) by inserting the following new paragraph immediately after paragraph (e)—
 - “(ea) by deleting the words “Any person guilty” appearing in subsection (7) and substituting therefor the words “A person convicted”;

Justification

1. To correct typographical errors; and
2. To harmonize conflicting penalties appearing at section 38(4) and 38(6) in relation to the same offences.

CLAUSE 22

THAT, clause 22 of the Bill be amended in the proposed new section 38A—

- (a) by deleting subsection (1) and substituting therefor the following new subsection:
 - “(1) Where a body corporate is convicted of an offence under this Act, every person who at the time the offence was committed was in charge of or was responsible to the body corporate for the conduct of its business and affairs is also deemed to have committed the offence and shall be liable to prosecution.”

(b) by deleting subsection (2) and substituting therefor the following new subsection:

“(2) Where it is proven that a body corporate committed an offence under this Act with the consent, connivance or willful lack of due diligence by a person in charge of or responsible to the body corporate for the conduct of its business and affairs, the person shall be guilty of the offence.”

Justification

To recast the proposed new section 38A on the criminal liability for body corporates to cater for the presumption of innocence for their staff and officers as guaranteed by Article 50(2)(a) of the Constitution.

CLAUSE 24

THAT, clause 24 of the Bill be amended—

(a) in paragraph (d) by deleting the words “shorter period” appearing immediately after the words “for a” in the proposed new subsection (3A) and substituting therefor the words “period not exceeding six months”;

(b) by deleting paragraph (j) and substituting therefor the following new paragraph—

“(j) in subsection (9), by—

(i) inserting the words “and two daily newspapers of national circulation” immediately after the word “Gazette”;

(ii) deleting the words “collecting society” wherever they appear and substituting therefor the words “collective management organisation”;

(c) in paragraph (k) by—

(i) deleting the proposed new subsection (10) and substituting therefor the following new subsection—

“(10) Before deregistering a collective management organization, the Board shall, notify the organization in writing and invite it and

any of its members to make written representations against deregistration within twenty one days from the date of the notice.”

- (ii) inserting the word “If” immediately before the word “After” appearing in the proposed new subsection (11);

Justification:

1. To amend the proposed new section 46(3A) to provide that the Board may grant a provisional licence for a period not exceeding six months;
2. To require the Board to publish the notice of deregistration of a CMO in two daily newspapers of national circulation, in addition to the Kenya Gazette;
3. To require the Board to invite representations from a CMO and its Members prior to deregistering the CMO; and
4. To correct typographical errors.

CLAUSE 25

THAT, clause 25 of the Bill be amended—

- (a) by deleting the proposed new section 46B and substituting therefor the following new section—

Qualification and
tenure of Directors and
Chairpersons of
collective management
organizations.

46B. (1) A member of a collective management organization shall be eligible for election as a director if he holds a post-secondary qualification recognized in Kenya.

(2) A director elected under this section shall serve for a term of three years and shall be eligible for re-election for one further term.

(3) A director elected as a chairperson of a collective management organization shall hold office for a term of three years and shall be eligible for re-election for one further term.

(4) A chief executive officer of a collective

management organization shall hold office for a term of four years and shall be eligible for reappointment for one further term upon satisfactory performance as evaluated by the directors.

(b) by inserting the following new section immediately after the proposed new section 46C—

Submission and
publication of
information royalties.

46CA. (1) A collective management organization shall submit to the Board information on its total collection and distribution of royalties annually.

(2) The Board shall, by notice in the Gazette, publish information submitted under subsection (1).

(c) in the proposed new section 46D—

(i) by deleting subsection (1) and substituting therefor the following new subsection—

“(1) The Executive Director may authorize a person, in writing, to inspect the books of accounts and records of a collective management organization.”

(ii) by deleting the words “Any failure” appearing in subsection (3) and substituting therefor the words “A person who wilfully fails”;

(iii) by deleting subsection (4) and substituting therefor the following new subsection—

“(4) The person authorized to inspect a collective management organization shall report to the Board on—

(a) any breach or non-observance of the requirements of this Act or regulations;

(b) any irregularity in the manner of conduct of the business of the organization;

(c) any apparent mismanagement or lack of management skills in the organization; or

(d) any other matter warranting remedial action or a forensic audit.”

(iv) by deleting subsection (6) and substituting therefor the following new subsection—

“(6) The powers conferred by subsection (1) may be exercised in the following circumstances—

(a) where a petition for inspection has been made by not less than forty five percent of the membership specifying breach of instruments establishing the collective management organization, the regulations or the Act;

(b) failure by a collective management organization to account for monies to at least twenty percent of its members;

(c) failure by a collective management organization to offer an account of the exploitation of the copyright works assigned or licensed to it;

(d) where a collective management organization has acted beyond its powers in administering the rights to which it is assigned or licensed;

(e) where a collective management organization has altered its memorandum or other internal rules to exclude a section of its members in participating in its affairs or as to alter its core business;

(f) where a collective management organization has persistently failed to adhere to its set administrative budget without a reasonable cause ; or

(g) where a collective management organisation has failed to comply with request for information or records from its members or the Board.”

(d) in the proposed new section 46E(1) by deleting the words “finds that an organisation conducts” appearing immediately after the word “report” in the opening statement and substituting therefor the words “that a collective management organization”;

(e) by deleting the proposed new section 46F;

(f) by deleting the proposed new section 46G and substituting therefor the following new section—

Record keeping and attendance of meetings by Board representatives.

46G. (1) The directors of a collective management organization shall cause minutes of all resolutions and proceedings of their meetings to be entered and updated in books kept for that purpose.

(2) The Board may, through a designated representative, attend and advise a meeting of the directors of a collective management organization where matters affecting member’s interests are proposed for discussion.

Justification:

1. To amend the proposed new section 46B to make a person with a minimum of a post-secondary qualification from a recognized institution eligible for election as a CMO director;
2. To allow CMO directors serve for a renewable three-year term and Chief Executive Officer to serve for a renewable four-year term;
3. To amend the proposed new section 46D to specify that the failure of a CMO to account to at least twenty percent of members constitutes grounds for the inspection of a its books;

4. To provide that the failure to furnish information or records that constitutes grounds for an inspection should relate to a request from KECOBO or members of a CMO;
5. To delete the proposed section 46F on “Rules” for purposes of recasting it as an amendment to section 49 of the Act which provides for regulations to be made by the Cabinet Secretary;
6. To reword the proposed section 46G for purposes of clarity; and
7. To require the annual publication of information on CMO collections and distributions.

CLAUSE 27

THAT the Bill be amended by deleting clause 27 and substituting therefor the following new clause—

Amendment
of section 48
of No. 12 of
2001.

27. The principal Act is amended by repealing section 48 and substituting therefor the following new section—

Appointment
and duties of
Copyright
Tribunal.

48. (1) There shall be a Copyright Tribunal appointed by the Chief Justice for the purpose of exercising jurisdiction under this Act where any matter requires to be determined by such Tribunal.

(2) The Copyright Tribunal shall consist of not less than three and not more than five persons, one of whom shall be an Advocate of not less than seven years standing or a person who has held judicial office in Kenya as Chairperson, appointed by the Chief Justice where any matters requires to be determined by the Tribunal.

(3) No person shall be appointed under this section, nor shall any person so appointed act

as a member of the Copyright Tribunal, if he, his partner, his employer body (whether statutory or not) of which he is a member has a pecuniary interest in any matter which requires to be determined by the Tribunal

(4) Subject to subsection (5), the Copyright Tribunal shall have jurisdiction to hear and determine—

(a) a dispute over registration of copyright; and

(b) an appeal against—

(i) the Board's refusal to grant a certificate of registration to a collective management organization;

(ii) imposition of unreasonable terms or conditions by the Board for the grant of a certificate of registration;

(iii) unreasonable refusal by a collective management organization to grant a licence in respect of a copyright work; or

(iv) Imposition of unreasonable terms or conditions by a collective management organization for the grant of a licence in respect of a

copyright work;

(5) Before determining a matter referred to it under this section, the Copyright Tribunal shall, in accordance with such procedure as may be prescribed, give both parties an opportunity to present their respective cases, either in person or through representatives, both orally and in writing.

(6) The Copyright Tribunal may order the grant of a certificate of registration or the grant of a license in respect of a copyright work subject to the payment of the applicable fees.

Justification:

1. To amend section 48 of the Act to include the arbitration of disputes between right-holders in the mandate of the proposed Copyright Tribunal; and
2. To place the Tribunal under the Judiciary as contemplated under Article 169(1)(d) of the Constitution.

.CLAUSE 28

THAT, the Bill be amended by deleting clause 28 and substituting therefor the following new clause—

Amendment of
section 49 of No.
12 of 2001.

28. The principal Act is amended by repealing section 49 and substituting therefor the following new section—

Regulations.

49. (1) The Cabinet Secretary may make regulations generally for the better carrying into effect of the provisions of this Act, including the extension of its application.

(2) Without prejudice to the generality of subsection (1) the regulations made under this section may—

(a) prescribe—

- (i) the audit of collective management organizations;
- (ii) the annual and special general meetings of collective management organizations;
- (iii) guidelines on the gender representation and participation of persons with disability and other marginalized groups on the boards of collective management organizations;
- (iv) the procedure of handling complaints made to the Board;
- (v) ratios of distributable income to administrative costs including deductions applicable to collective management organizations;
- (vi) the manner of approval of

- distribution rules;
 - (vii) the manner of approval of cash reserves;
 - (viii) the manner of approval of membership to a collective management organization;
 - (ix) a system for the identification of copyright works and monitoring of payment, collection and distribution of royalties; and
 - (x) anything required by this Act to be prescribed;
- (b) extend the application of this Act in respect of any or all of the works referred to in section 22 (1)—
- (i) to individuals or bodies corporate who are citizens of, domiciled or resident in or incorporated under the laws of Kenya or a country which is a party to a treaty to which Kenya is also a party and which provides for the

protection of copyright and related rights in works to which the application of this Act extends;

(ii) to works, other than sound recordings, first published in Kenya or a country which is a party to a treaty to which Kenya is also a party and which provides for the protection of copyright and related rights in works to which the application of this Act extends; or

(iii) to sound recordings made or published in Kenya or a country which is a party to a treaty to which Kenya is also a party and which provides for the protection of copyright and related rights in works to which the application of this Act extends; and

(c) restrict the right to control the translation or the

reproduction of a work up to the extent permitted by any Copyright Convention for the time being in force in Kenya:

Provided that the work belongs to or is first published or first made in or first made available to the public by individuals or bodies corporate who are citizens of, domiciled or resident in or incorporated under laws of a country which is a party to a treaty, convention or international agreement which Kenya is a party to and which provides for the protection of copyright and related rights as Kenya.

(3) For the purposes of Article 94 (6) of the Constitution—

(a) the purpose and objective of delegation under this section is to enable the Cabinet Secretary to make regulations to provide for the better carrying into effect of the provisions of this Act and to enable the Board to discharge its functions more effectively;

(b) the authority of the Cabinet Secretary to make regulations under this Act will be limited to bringing into effect the provisions of this Act and to fulfil the objectives specified under this section;

(c) the principles and standards applicable to the regulations made under this section are those set out in the Interpretation and General Provisions Act and the Statutory Instruments Act, 2013.

Cap 2,

No. 23 of 2013

Justification

1. To amend section 49 of the Act to include the mandate contained in the proposed new section 46F as part of the Regulations to be made by the Cabinet Secretary;
2. To include the formulation of a system for the identification of copyright works and monitoring of payment, collection and distribution of royalties as part of the regulations to be made by the Cabinet Secretary;
3. To align section 49 with Article 94(6) of the Constitution on the purpose and limits of the exercise of delegated powers.

NEW CLAUSES

1. THAT, the Bill be amended by inserting the following new clause immediately after clause 7—

Repeal and
replacement of
section 21 of No.
12 of 2001.

7A. The principal Act is amended by repealing Section 21 and substituting therefor the following new section—

Appeals.

21. (1) A person aggrieved by the decision of the Board under this Act may, within sixty days from the date of the decision, appeal to the Copyright Tribunal.

(2) The Board shall provide written comments on any matter over which an appeal has been submitted to the Copyright Tribunal under this section upon request from the Copyright Tribunal.

(3) The Copyright Tribunal shall issue a decision on the appeal within thirty days from the date of such an appeal.

Justification:

To amend section 21 of the Act to delete references to the “competent Authority” and replace them with the “Copyright Tribunal” as proposed in the Bill.

2. THAT, the Bill be amended by inserting the following new clauses immediately after clause 9—

Amendment of
section 23 of No.
12 of 2001.

9A. Section 23 of the principal Act is amended—

(a) in subsection (2) by inserting the word “dramatic” immediately after the word

“musical”;

(b) in subsection (3) by inserting the word “dramatic” immediately after the word “musical”;

Amendment of section 24 of No. 12 of 2001.

9B. Section 24(1)(a) of the principal Act is amended by inserting the word “dramatic” immediately after the word “musical”.

Amendment of section 25 of No. 12 of 2001.

9C. Section 25(2) of the principal Act is amended by inserting the word “dramatic” immediately after the word “musical”.

Justification:

To amend sections 23, 24 and 25 of the Act to include dramatic works as part of the works covered under the Act.

3. THAT, the Bill be amended by inserting the following new clause immediately after clause 11—

Amendment of section 27 of No. 12 of 2001.

11A. Section 27 of the principal Act is amended—

(a) in subsection (1) by inserting the word “dramatic” immediately after the word “musical”;

(b) in subsection (2) by deleting the words “competent authority” appearing immediately after the words “determined by the” and substituting therefor the words “Copyright Tribunal”.

Justification:

1. To amend section 27 of the Act to include dramatic works as part of the works covered under the Act; and

2. To delete references to the “compctent Authority” and replace them with the “Copyright Tribunal” as proposed in the Bill.

4. **THAT**, the Bill be amended by inserting the following new clause immediately after clause 20—

Amendment of
section 37 of No
12 of 2001

20A. Section 37(1) of the principal Act is amended in the closing statement by deleting the words “competent authority” appearing immediately after the words “court or” and substituting therefor the words “Copyright Tribunal”.

Justification:

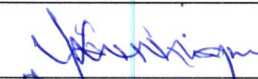
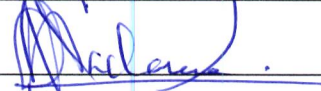
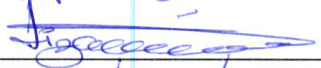


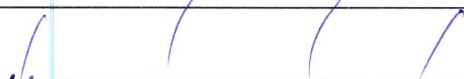
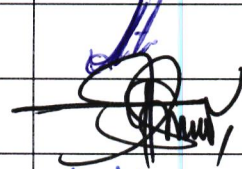
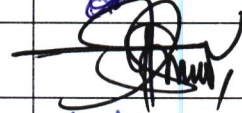
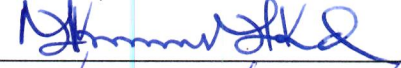

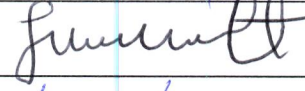
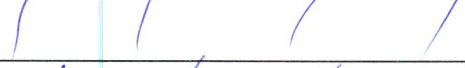


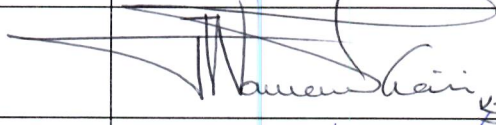



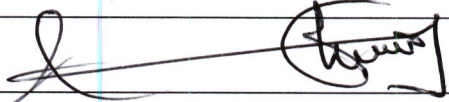
To amend section 37 of the Act to delete references to the “competent Authority” and replace them with the “Copyright Tribunal” as proposed in the Bill.

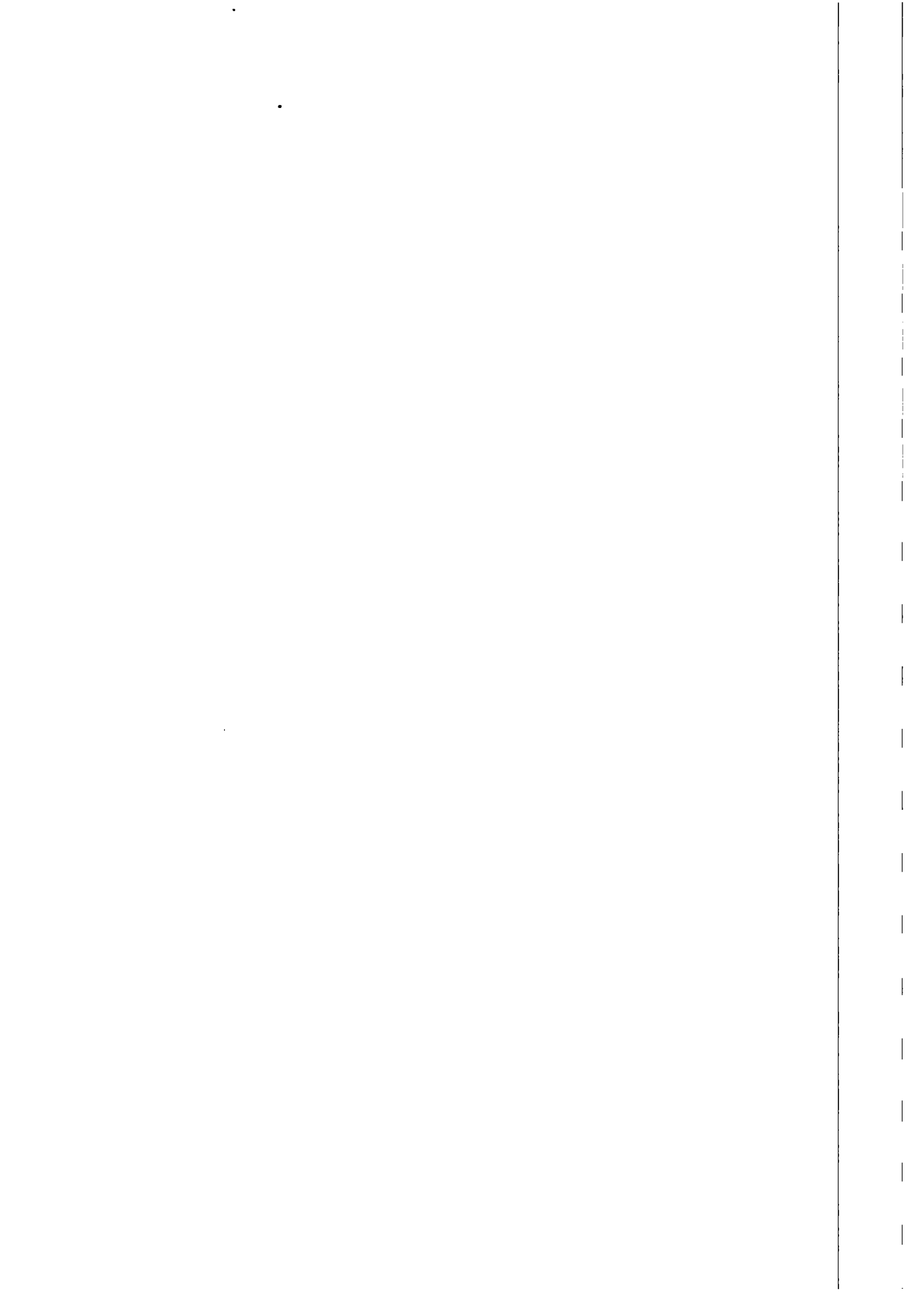
ANNEX I

THE DEPARTMENTAL COMMITTEE ON COMMUNICATION, INFORMATION AND INNOVATION

MEMBERS ADOPTION LIST

ADOPTION OF THE REPORT ON THE CONSIDERATION OF THE COPYRIGHT (AMENDMENT) BILL, 2017

NO.	NAME	SIGNATURE
1.	Hon. Kisang, William Kipkemoi, M.P - Chairperson	
	Hon. George, Macharia Kariuki, M.P - Vice – Chairperson	
3.	Hon. Liza, Chelule Chepkorir, M.P.	
4.	Hon. Alfah, O. Miruka, M.P.	
5.	Hon. Annie Wanjiku Kibeh, M.P.	
6.	Hon. Joshua Kimilu, Kivinda, M.P.	
7.	Hon. Marwa Kitayama Maisori, M.P.	
8.	Hon. Mwambu Mabongah, M.P.	
9.	Hon. Maritim Sylvanus, M.P.	
10.	Hon. Mwangaza Kawira, M.P.	
11.	Hon. Jonah Mburu, M.P.	
12.	Hon. Gertrude Mbeyu Mwanyanje, M.P.	
13.	Hon. Wamuchomba, Gathoni, M.P.	
14.	Hon. (Eng). Mark Nyamita Ogola, M.P.	
15.	Hon. John Kiarie Waweru, M.P.	
16.	Hon. Erastus Nzioka Kivasu, M.P.	
17.	Hon. Godfrey Osotsi, Atieno, M.P.	
18.	Hon. Innocent Momanyi, Obiri, M.P.	
19.	Hon. Anthony, Tom Oluoch, M.P.	



Where stigma drives married women to FGM

Where stigma drives married women to FGM

Elders believed to have magical powers that can bring problems to those who are uncircumcised

BY VIVERE NANDIEMO
ndiem@yahoo.com

Ms Robi Nchagwa is 40 but used to feel like an outcast until four years ago. She was labelled a bad omen in her Nyamagongwi village, Kuria East Sub-County. Her husband's relatives disliked her and blamed her for the misfortunes that befell them. All this because she had refused to be circumcised as a girl. In a community where girls must face the knife, it was unheard of. "I was seen as a pariah. My husband's relatives blamed me for the misfortunes that befell the family," she said. According to Kuria traditions, an uncircumcised woman should not be married. Any man who marries such a woman attracts problems. The uncut woman — derogatorily

called "irikunene" — is not allowed to mingle with others, especially at social functions.

Ten years into her marriage, Nchagwa could take it no longer. She gave in to pressure and went for the cut in 2014.

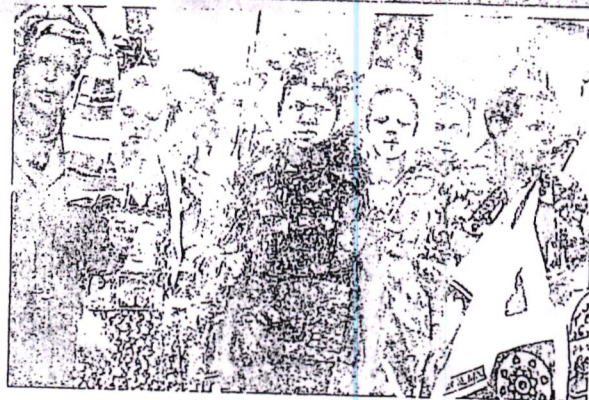
"I was tired of being mistreated and my husband was almost marrying a second wife. I had to do it and I am now at peace with everyone though I feel it was not right," Ms Nchagwa said.

As the world marks the International Day on Zero Tolerance for FGM, campaigners say stigma is one of the main challenges in the battle against the cut.

Ms Vera Robi, the founder of Kuria

"I was seen as a pariah. My husband's relatives blamed me for the misfortunes that befell the family. I had to do it and I am now at peace with everyone though I feel it was not right."

Robi Nchagwa



FILE | NATION

Initiates leave the compound of the *omasari* — the circumciser — in Kuria East Sub-County. The International Day on Zero Tolerance for FGM is being observed today.

Anti-FGM and Centre for Child Empowerment, said many married women were being forced into the rite.

"Girls fear being subjected to the same situation in future and opt for the cut," Ms Robi said.

Apart from the stigma, the community still holds on to beliefs and taboos that protect FGM. Elders wield enormous influence.

It is believed that those who reject the rite are bound to face serious consequences from Eresa, the god of circumcision.

According to the belief, mysterious deaths, accidents, strange illnesses, unstable marriages, insanity and other misfortunes follow such people.

Mr Ng'ariba Mwitia, an elder, said many deaths and family break-ups were linked to opposition to the cut.

"These cases are real. Those who disobey the ancestors face consequences," he told the *Nation*.

It is believed elders have special powers from Eresa to perform magical feats known as 'tambiko' to cast a spell on anyone who does not go for the cut.

Deputy County Commissioner Wesley Koech admits that the beliefs have slowed the government's efforts in combating FGM.

"The beliefs are strong. Elders threaten those who are opposed to them," Mr Koech said.

However, he maintained that the government would not relent in the war against FGM.

FGM is linked to the high number of school dropouts and teenage pregnancies in Kuria.

BRIEFLY

NYERI Doctor denies running medical college illegally

Embu Level Five Hospital C Moses Njue has been freed of Sh200,000 bond after denying operating a college illegally. Dr Njue also denied admitting students to Kings Medical College without approval from the Kenya Medical Practitioners and Technicians Board. The former government pathologist was charged alongside the co-director of the college Lucy Kanyiri and two lecturers — Lt Muriithi and Evans Orwaru. The medical college is in Kieni East Sub-County, Nyeri. The case was heard on March 16.

—Joseph Wang

KIRINYAGA Man in wife murder case to be detained for 10 days

A man accused of killing his wife will remain in custody for 10 days while police complete their investigations. The court was told that Nazario Muriuki Mbogo beheaded his wife on Saturday. He was presented in court yesterday but did not take plea. According to the prosecution, Mr Mbogo killed his wife and locked the body in the house. The two had earlier in the day attended a parents' meeting at the son's school. Moments after returning home, the woman was heard screaming. Neighbours arrived later and found the body.

—Nicholas Kom

REPUBLIC OF KENYA



NATIONAL ASSEMBLY
TWELFTH PARLIAMENT – FIRST SESSION

In the Matter of consideration by the National Assembly -
The Computer and Cybercrimes Bill, 2017

SUBMISSION OF MEMORANDA

Article 118(1) (b) of the Constitution provides that: "Parliament shall facilitate public participation and involvement in the legislative and other business of Parliament and its Committees".

Further, Standing Order 127(3) provides that, "the Departmental Committee to which a Bill is committed shall facilitate public participation and shall take into account views and recommendations of the public when the Committee makes its report to the House".

The Computer and Cybercrimes Bill, 2017 proposes to provide a framework to prevent and control the threat of cybercrime, that is, offences against computer systems and offences committed by means of computer systems.

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MR. MICHAEL R. SIALAI, EBS
CLERK OF THE NATIONAL ASSEMBLY

REPUBLIC OF KENYA



NATIONAL ASSEMBLY
TWELFTH PARLIAMENT – FIRST SESSION

In the Matter of consideration by the National Assembly -
The Copyright (Amendment) Bill, 2017

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The Copyright (Amendment) Bill, 2017 seeks to amend several clauses of the Copyright Act 2001. The general objective of the amendments is to expand the scope of copyright protection, add extensive protection in respect of broadcasts and signals, promote sound corporate governance and improve efficiency in royalty collection.

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Her love for children birthed life-long journey

Kibera woman feeds 37 children all on her own

One night in June 2002, strangers knocked on her door and dropped off two boys found on the streets. This marked the beginning of her journey.

By Gardy Chacha
gchacha@standardmedia.co.ke

To get to Pamela Owino's house, one must navigate a labyrinth of narrow alleys. In Kibera, where she lives, most residents' top priority is putting food on the table.

"With food in your stomach you can survive another day," says Ms Owino.

Fifteen years ago, Owino, 54, was your average woman surviving on small business ventures. But she was also known for her friendliness towards children.

"I used to interact with girls who had had babies and were struggling with providing for

Pamela's children

- The youngest of the 37 children is two while the oldest is 15 years
- She spends approximately Sh1,800 daily to put food on the table
- She farms sugarcane on a leased plot of land in Chemellil and use the earnings for food

them and motherhood issues," she recalls.

"I would watch their children as they went to buy small items for sale. They used the profits to feed their children."

Past midnight

One night - well past midnight - in June 2002, strangers knocked on her door and dropped off two boys.

"They said they picked the

boys from the streets hungry and with nowhere to sleep. Someone led them to my house - because apparently I was helping small children," she says.

The boys, it turned out, had been chased from home by their mother. The woman had become suicidal after being dumped by her husband who (she had just discovered) had infected her with HIV.

"My husband and I were shocked," Owino says. "Not to mention that we had five children of our own that we needed to look after."

But the strangers hadn't come to debate whether they should leave the boys with her or take them away.

"I just couldn't refuse to accommodate them, at least for the night."

The next day, Owino confronted the boys' mother, who swore she would kill them if Owino forced her to take them back. And just like that, she

became a mother of two more children. Her gesture attracted more people to drop off children and by 2006, she had 31.

"Somehow my husband and I made just enough to buy us food," she says.

Donated food

Once in a while, well-wishers donated food and money. Between 2008 and 2011, Owino worked at the United Nations Development Programme on contract. It was her salary that kept the family going.

But at some point, her husband left, saying she had to choose between him and the children.

"I couldn't chase the children away; they were totally innocent. So my husband left for another woman," she says.

Over the years, 145 children have gone through Owino's home. Today she still has 37 who are in school and who depend on her for food and fees.



Pamela Owino, 54, who cares for children using her own resources. The children are mostly dumped by their parents or are orphans from diverse backgrounds. [Gardy Chacha, Standard]

REPUBLIC OF KENYA



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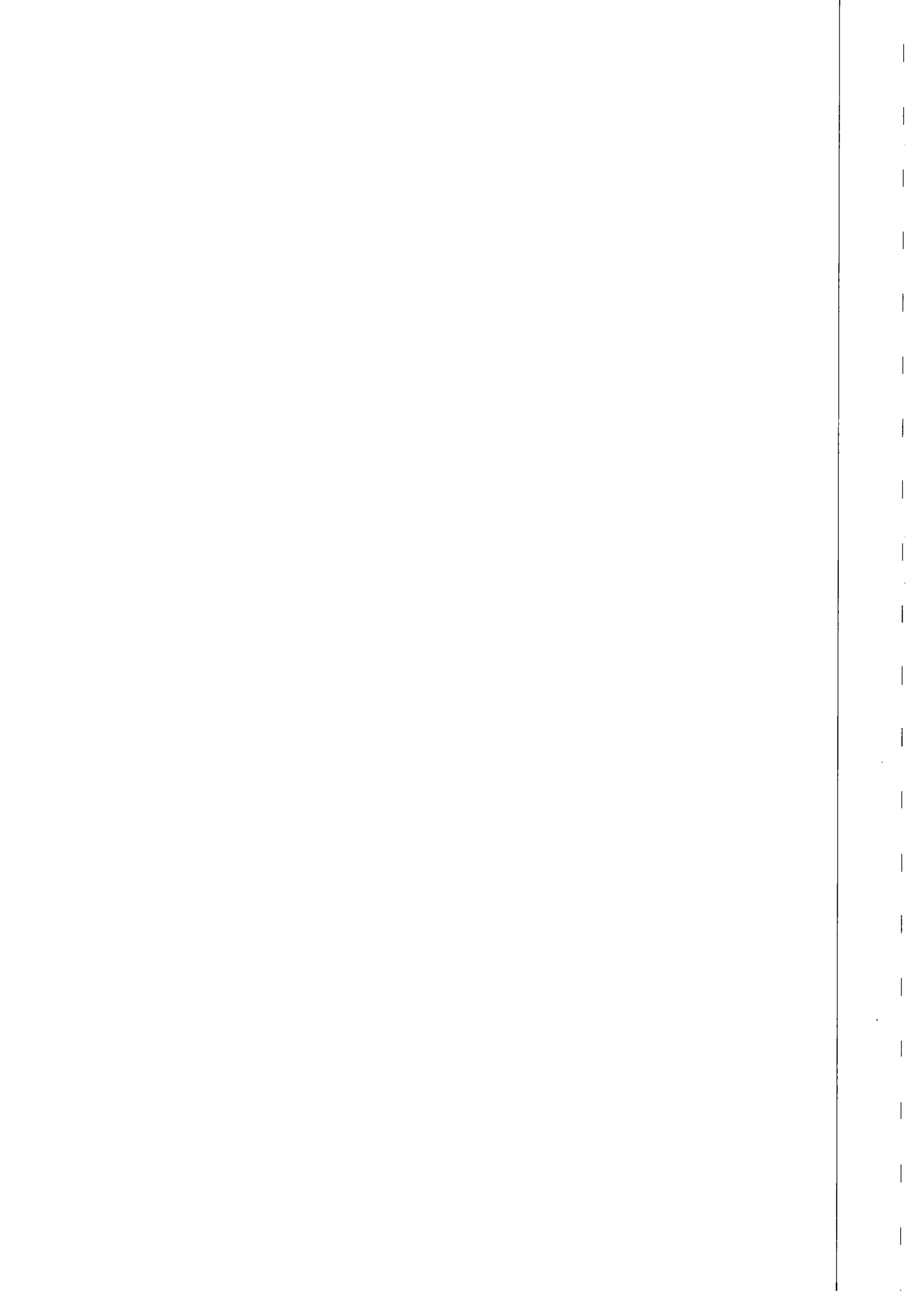
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CLERK OF THE NATIONAL ASSEMBLY



ANNEX 3

MINUTES OF THE 60TH SITTING OF THE DEPARTMENTAL COMMITTEE ON COMMUNICATION, INFORMATION AND INNOVATION HELD IN 4TH FLOOR PROTECTION HOUSE, ON TUESDAY 26TH JUNE, 2018 AT 9.30AM

PRESENT

1. **Hon. William Kipkemoi, M.P.** -Chairperson
2. Hon. George Macharia Kariuki, M.P. -Vice- Chairperson
3. Hon. Annie Wanjiku Kibeh, M.P
4. Hon. Maritim Sylvanus, M.P
5. Hon. John Kiarie Waweru, M.P
6. Hon. Mwambu Mabongah, M.P.
7. Hon. Anthony Tom Oluoch, M.P.
8. Hon. Marwa Kitayama Maisori, M.P.
9. Hon. Liza Chelule Chepkorir, M.P
10. Hon. Jonah Mburu, M.P.

APOLOGIES

1. Hon. Godfrey Osotsi Atieno, M.P
2. Hon. (Eng.). Mark Nyamita, M.P
3. Hon. Joshua Kimilu Kivinda, M.P.
4. Hon. Mwangaza Kawira, M.P
5. Hon. Wamuchomba Gathoni, M.P
6. Hon. Innocent Momanyi Obiri, M.P
7. Hon. Erastus Nzioka Kivasu, M.P.
8. Hon. Gertrude Mbeyu Mwanyanje, M.P
9. Hon. Alfah O. Miruka, M.P

National Assembly Secretariat

1. Ms Ella Kendi Clerk Assistant III
2. Mr. Ronald Walala Legal Counsel II
3. Mr. Elijah Ichwara Audio Officer
4. Mr. Wilson Angatangoria Serjeant at arms

MIN.NO./NA/CI/2018/210:

PRELIMINARIES

The meeting was called to order at thirty minutes past nine o'clock followed with a word of prayer.

**MIN.NO/NA/CII/2018./210: CONSIDERATION AND ADOPTION OF THE REPORT
ON COPYRIGHT (AMENDMENT) BILL, 2017**

The Committee considered and adopted the report with the following recommendations;

CLAUSE 2

THAT, clause 2 of the Bill be amended—

(a) by deleting paragraph (a) and substituting therefor the following new paragraph—

“(a) in the definition of author by—

- (i) inserting the word “dramatic” immediately after the word “musical” appearing in paragraph (a);
- (ii) deleting the word “film” appearing in paragraph (d) and substituting therefor the word “work”;
- (iii) deleting the word “working” appearing in paragraph (h) and substituting therefor the word “making”;

(b) in paragraph (e) by deleting the word “forklore” and substituting therefor the word “folklore”;

(c) in paragraph (f)(ii) by inserting the words “which constitutes an infringement of any rights protected by this Act” immediately after the words “a work or live performance” appearing in the proposed paragraph (aa);

(d) in paragraph (g) by deleting the proposed new definition of “musical work” and substituting therefor the following new definition—

“musical work” means a work consisting of music, irrespective of musical quality, and includes a graphical notation of such work and works composed for musical accompaniment”

(e) by deleting paragraph (j) and substituting therefor the following new paragraph—

“(j) by deleting the definition of “school” and substituting therefor the following new definition—

“school” means an institution registered or accredited under the Universities Act, 2012, the Basic Education Act, 2013 or the Technical and Vocational Education and Training Act, 2013”;

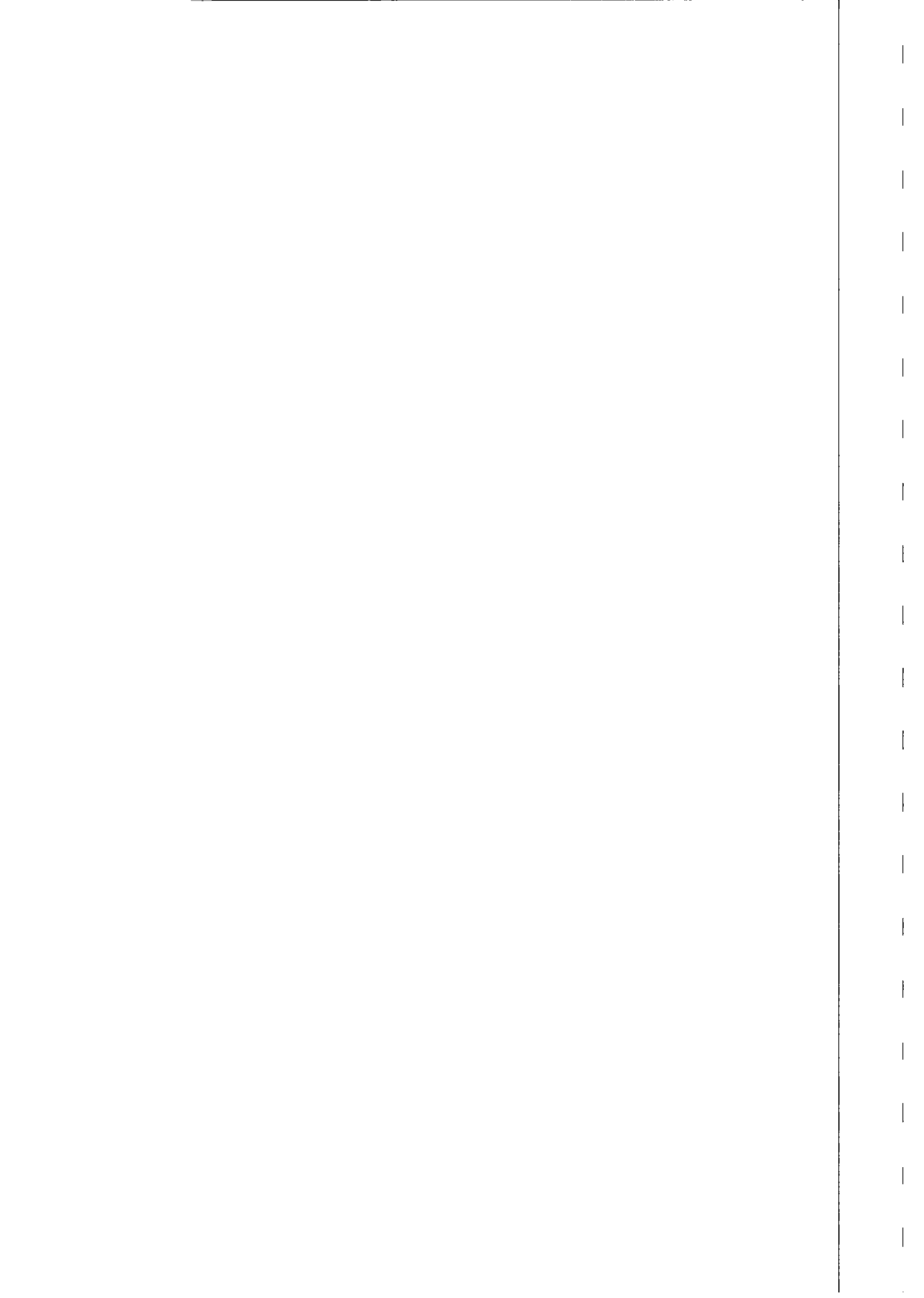
(f) In paragraph (k) in the proposed new definition of work by inserting the word “dramatic” immediately after the word “artistic”;

(g) by deleting paragraph (l) and substituting therefor the following new paragraph—

“(l) by deleting the definition of “technical measure” and substituting therefor the following new definition—

“technological protection measure” means any device, product or component incorporated into a work that effectively prevents or inhibits the infringement of any copyright or related right”;

(h) by inserting the following new paragraphs immediately after paragraph immediately after paragraph (l)—



“(m) by inserting the following new definitions in their proper alphabetical sequence—

“accessible format copy” means a copy of a work in an alternative manner or form which gives a beneficiary person access to the work, including permitting the person to have access as feasibly and comfortably as a person without visual impairment or other print disability;

“art market professional” includes an auctioneer, owner or operator of a gallery, museum, an art dealer or any other person involved in the business of dealing in artworks;

“artwork” means an original work of visual art created by an artist or artists, or produced under their authority;

“authorized entity” means an entity that is authorized or recognized by the government to provide education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit basis and includes a government institution or non-profit organization that provides the same services to beneficiary persons as one of its primary activities or institutional obligations;

“beneficiary person” means a person who—

- (a) is blind;
- (b) has a visual impairment or a perceptual or reading disability which cannot be improved to give visual function substantially equivalent to that of a person who has no such impairment or disability and so is unable to read printed works to substantially the same degree as a person without an impairment or disability; or
- (c) is otherwise unable, through physical disability, to hold or manipulate a book or to focus or move the eyes to the extent that would be normally acceptable for reading, regardless of any other disabilities;

“buyer” means a person to whom ownership is transferred in an artwork under commercial resale;

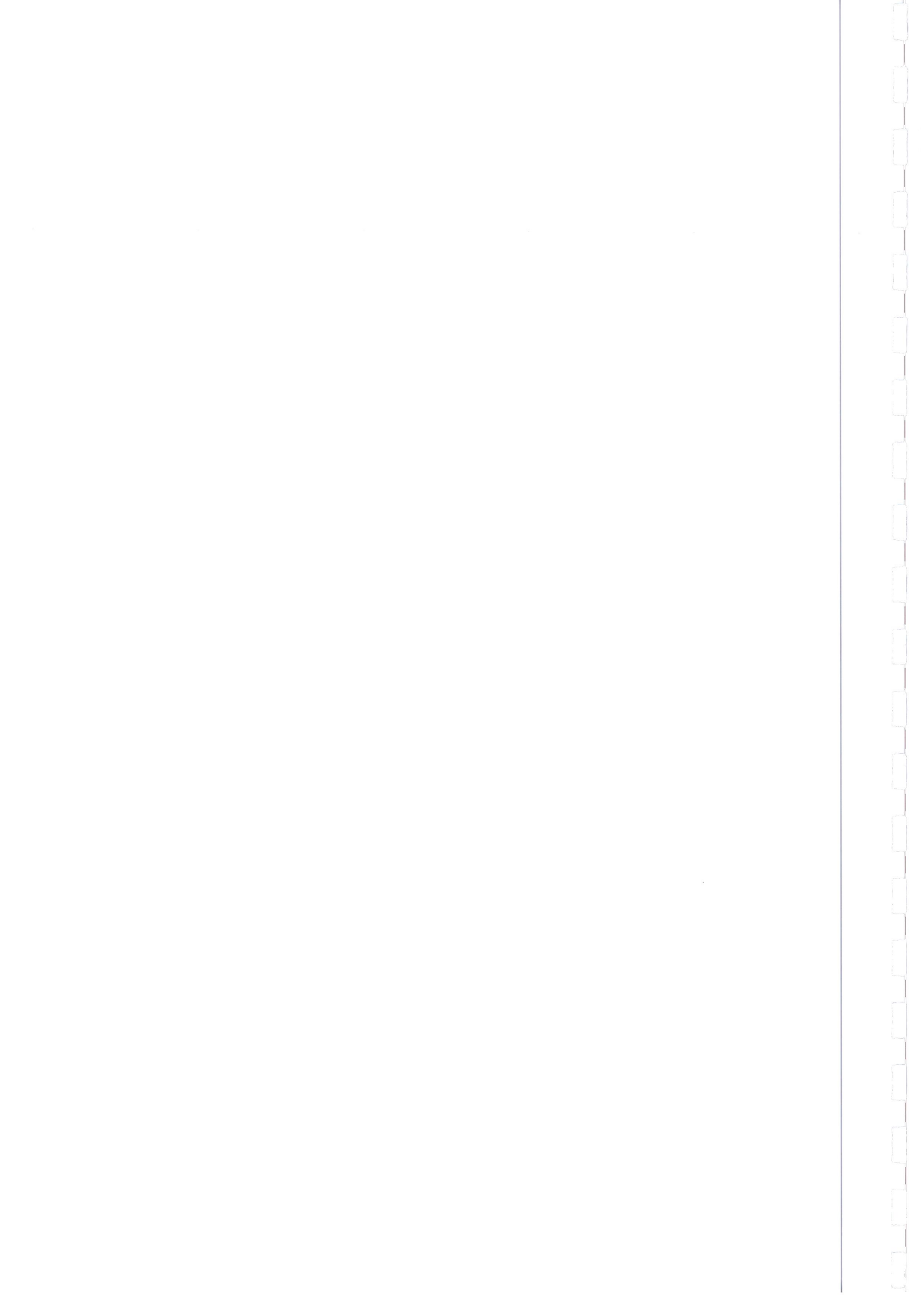
“commercial resale” means the subsequent re-transfer of ownership in artwork from one person to another for monetary consideration with the involvement of an art market professional;

“Copyright Tribunal” means the tribunal established under section 48 of the Act;

“exclusive licence” means a licence in writing signed by or on behalf of an owner or prospective owner of copyright or related rights, authorizing the licensee to the exclusion of all other persons, including the person granting the licence, to exercise a right which by virtue of this Act would apart from the licence be exercisable exclusively by the owner of copyright or related rights;

“information system” means a system for generating, sending, receiving, storing, displaying or otherwise processing data and includes internet;

“information system services” includes the provision of connections, the operation of facilities for information systems, the provision of access to



information systems, the transmission or routing of data between or among points specified by a user and the processing and storage of data, at the individual request of the recipient of the service;

“Internet Service Provider” means a person providing information services, systems, or access software that provides or enables computer access by multiple users to a computer server including connections for, the transmission or routing of data;

“collective management organisation” means an organisation approved and authorized by the Board which has as its main object, or one of its main objects, the negotiating for the collection and distribution of royalties and the granting of licenses in respect of the use of copyright works or related rights;

“owner of the copyright” means the first owner, an assignee or an exclusive licensee, as the case may be, of the relevant portion of the copyright;

“performance” means the representation of a work by such action as dancing, playing, reciting, singing, declaiming or projecting to listeners by any means whatsoever;

“performer” means an actor, singer, declaimer, musician or other person who performs a literary, musical or dramatic work or a work of folklore and includes the conductor of the performance of any such work;

“public display” means the showing of original or a copy of a work—

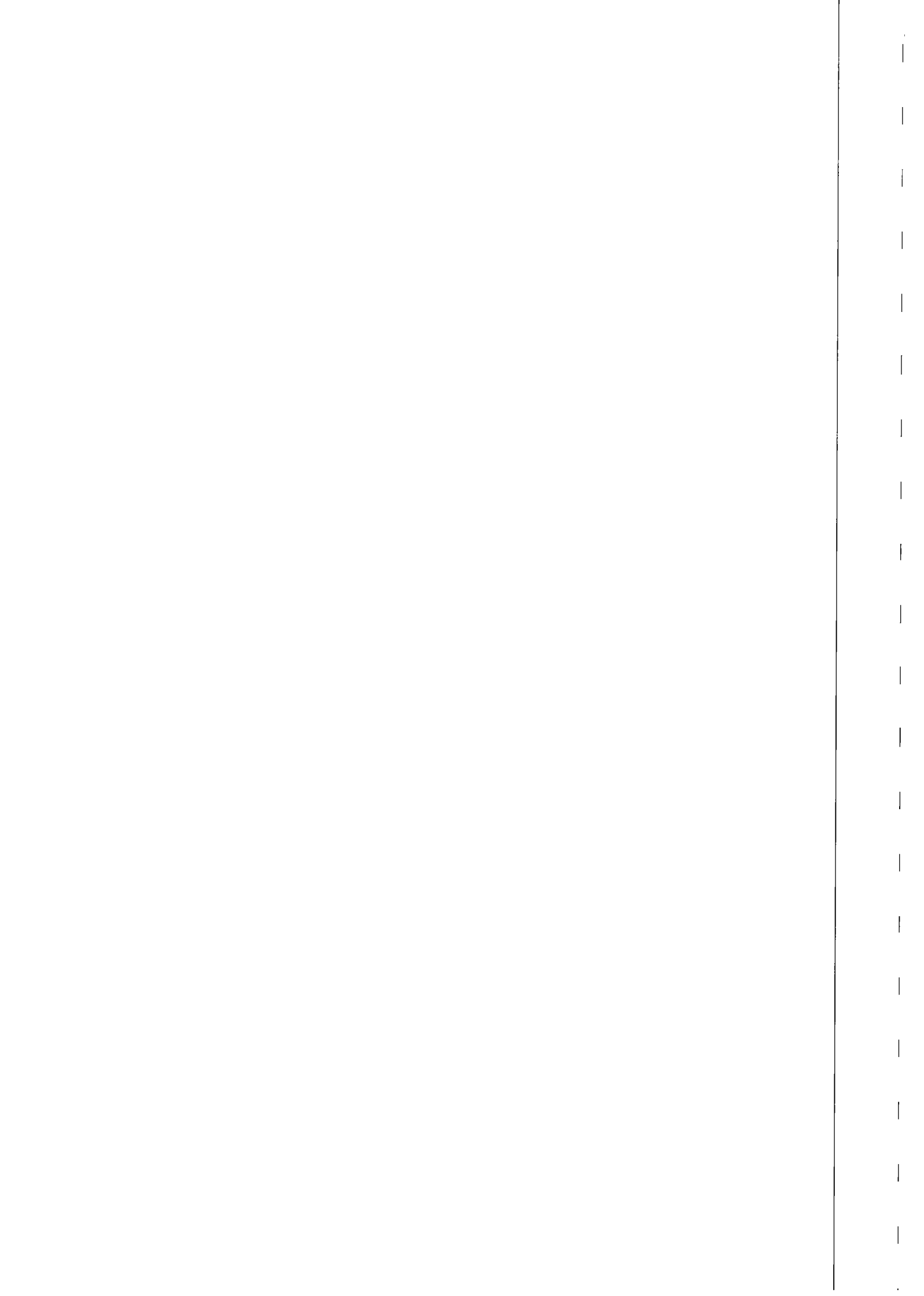
- (a) directly;
- (b) by means of a film, slide, television image or otherwise on screen;
- (c) by means of any other device or process;
- (d) in the case of an audio-visual work, showing of individual images consequentially at a place or places where persons outside the normal circle of a family and its closest social acquaintances are or can be present irrespective of whether they are or can be present at the same place and time or at different places or times, where the work can be displayed without communication to the public;

“publication” means a work or a sound recording, copies of which have been made available to the public in a reasonable quantity for sale, rental, public lending or for other transfer of the ownership or the possession of the copies:

Provided that, in the case of a work, the making available to the public took place with the consent of the author or other owner of copyright, and in the case of a sound recording, with the consent of the producer of the sound recording or his successor in title;

“public performance” means—

- (a) in the case of work other than an audio-visual work, the recitation, playing, dancing, acting or otherwise performing the work, either directly or by means of any device or process;
- (b) in case of an audio-visual work, the showing of images in sequence and the making of accompanying sound audible; and



(c) in the case of a sound recording, making the recorded sounds audible at a place or at places where persons outside the normal circle of the family and its closest acquaintances are or can be present, irrespective of whether they are or can be present at the same place and time, or at different places or times, and where the performance can be perceived without the need for communication to the public;

“record” means any device in which sounds or the representations of sounds are embodied which are capable of reproduction there from with or without the aid of another instrument;

“related rights” mean rights neighboring on copyright, including those subsisting under sections 27(2), 28, 29 and 30 of this Act;

“resale royalty right” means the right of artist or group of artists or successors to receive resale royalty on commercial resale of an artwork;

“seller” means the person who transfers ownership of the artwork under commercial resale; and

“specialized formats” means Braille, audio, or digital text or any other media which is exclusively for use by visually impaired or other persons with disabilities, and with respect to print instructional materials, includes large print formats when such materials are distributed exclusively for use by visually impaired or other persons with disabilities.

(n) by deleting the definition of “competent authority”

Justification:

1. To include dramatic works as part of the works covered by copyright under the Act;
2. To correct a typographical error;
3. To delete the definition of “technical” measure” and substitute with the definition of “technological protection measure” for purposes of consistency with the proposals in the Bill and the existing provisions in the Act;
4. To delete the definition of “organization” and substitute with the definition of “collective management organization” for purposes of clarity and consistency with the proposals in the Bill;
5. To delete the definition of “original work of art” which is unnecessary;
6. To amend the definition of “publication” to apply to intangible works as well; and
7. To amend the Act to delete the definition of “competent Authority” in line with the proposals in the Bill to change it into a Copyright Tribunal.

CLAUSE 3

THAT, clause 3 of the Bill be amended by deleting paragraph (b);

Justification:

To delete the proposed requirement that the Board register all dealers of copyright which is an impossible task.



CLAUSE 5

THAT, clause 5 of the Bill be amended—

- (a) in paragraph (a) by inserting the words “through a competitive process” immediately after the words “appointed by the Board” appearing in the proposed new subsection 11(1);
- (b) by deleting paragraph (b) and substituting therefor the following new paragraph—
“(b) by deleting subsection (2) and substituting therefor the following new subsection—

“(2) A person shall qualify for appointment under this section if he or she—

- (a) is as an advocate of the High Court of Kenya of not less than five years’ standing or has held judicial office in Kenya;
- (b) has at least five years managerial experience; and
- (c) has at least five years’ experience in matters relating to copyright and other related rights”

Justification:

1. To ensure that the Executive Director is recruited through a competitive process; and
2. To introduce reasonable the qualifications for appointment as Executive Director i.e. one has to be an advocate of the High Court of not less than five years standing with at least five years’ managerial experience and experience in copyright matters. This is due to the technical nature of copyright.

CLAUSE 8

THAT, the Bill be amended by deleting clause 8 and substituting therefor the following new clause—

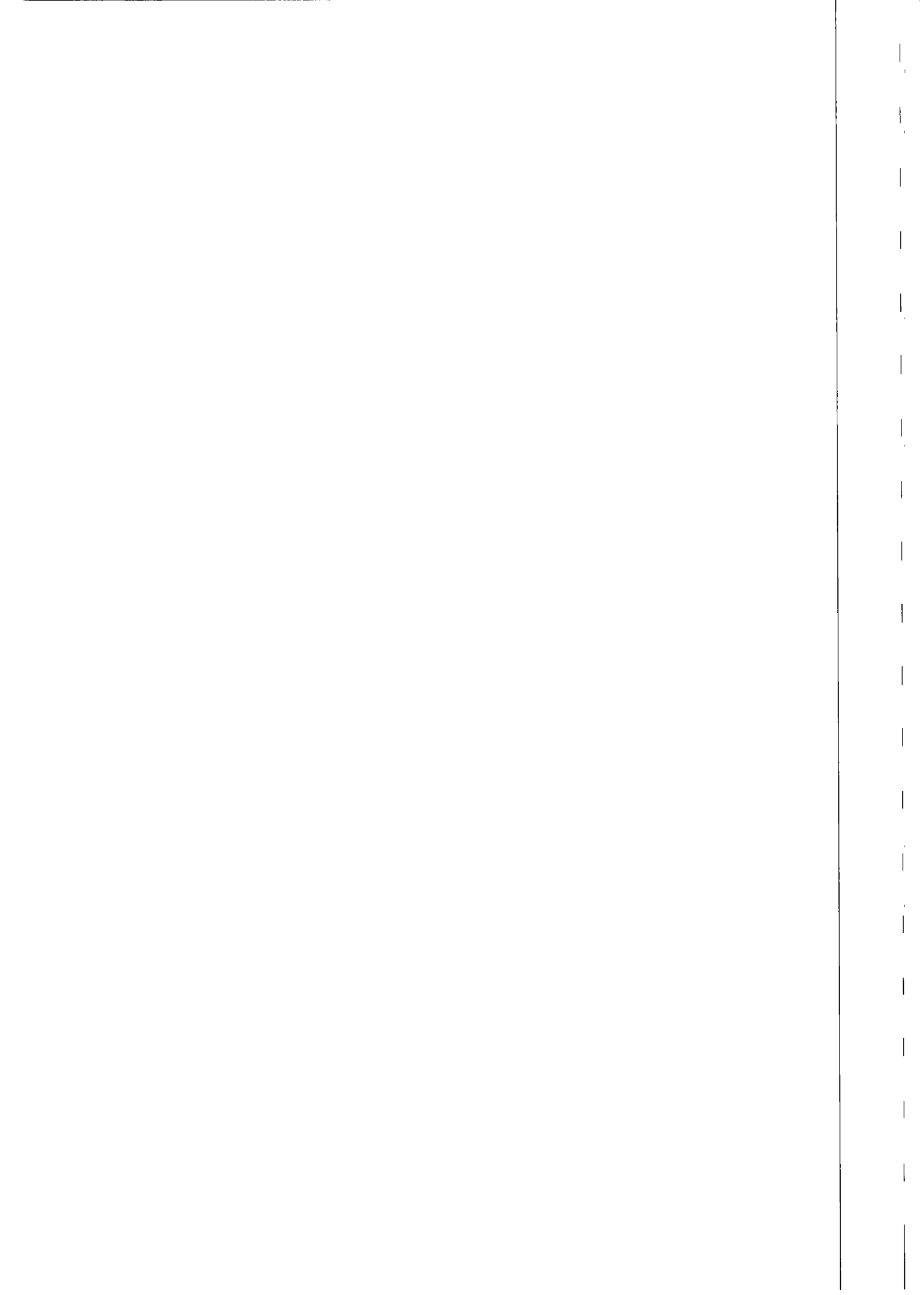
Amendment of section
22 of No. 12 of 2001.

8. Section 22 of the principal Act be amended in subsection (1) by—

- (a) inserting the words “or related rights” immediately after the word “copyright” in the opening statement;
- (b) inserting the following new paragraph immediately after paragraph (c).
“(ca) dramatic works”

Justification:

To amend the Act to cover dramatic works under copyright and related rights.



CLAUSE 10

THAT, clause 10 of the Bill be amended in the proposed new section 26 by deleting subsection (1) and substituting the following new subsection—

(1) Copyright in a literary, musical, artistic, dramatic or audio-visual work shall be the exclusive right to control the doing in Kenya of any of the following acts—

- (a) the reproduction in any material form of the original work;
- (b) the translation or adaptation of the work;
- (c) the distribution to the public of the work by way of sale, rental, lease, hire, loan, importation or similar arrangement;
- (d) the communication to the public of the whole work or a substantial part thereof, either in its original form or in any form recognizably derived from the original;
- (e) the making available of the work of the whole work or a substantial part thereof, either in its original form or in any form recognizably derived from the original; and
- (f) the broadcasting of the whole work or a substantial part thereof, either in its original form or in any form recognizably derived from the original.

Justification:

To insert missing words in paragraph (1) (d) and (e) of the proposed new section 26 of the Act.

CLAUSE 11

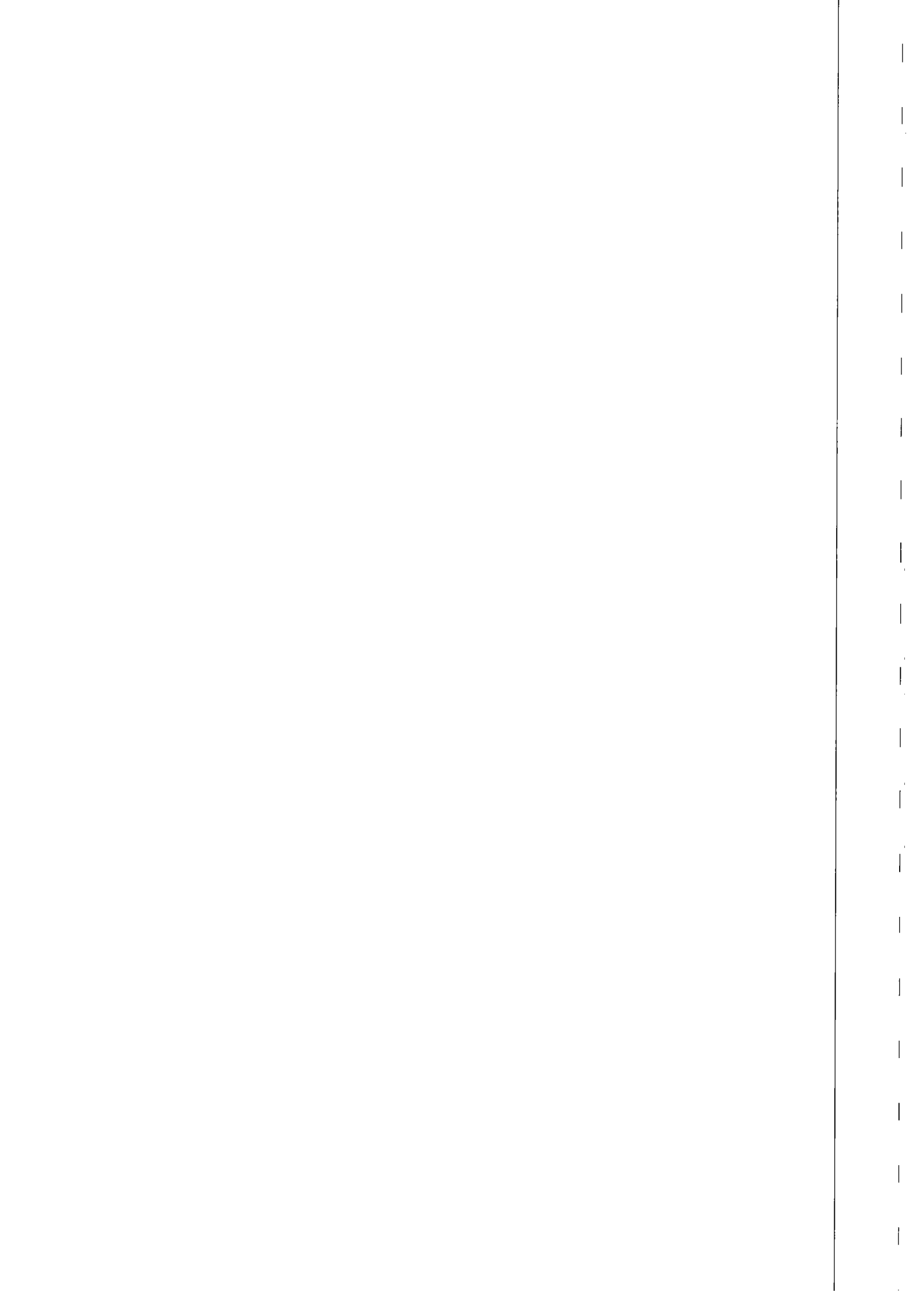
THAT, clause 11 of the Bill be amended—

- (a) In the proposed new section 26C(1) by deleting paragraph (b) and substituting therefor the following new paragraph—

“(b) to make, import, distribute, lend or share accessible format copies by a beneficiary person or authorized entities or persons acting on behalf of a beneficiary person, including the circumvention of any technological protection measures that may be in place, subject to the terms and conditions set out under Regulations.”

- (b) In the proposed new section 26D by—

- (i) inserting the word “of” immediately after the word “work” appearing in subsection (1);



- (ii) deleting subsection (4) and substituting therefor the following new subsection—

“(4) The resale royalty shall be payable at the rate of five percent of the net sale price on the commercial resale of an artwork and the seller, the art market professional, the seller’s agent and the buyer shall be jointly and severally liable to pay the resale royalty.”

Justification:

To correct typographical errors and insert missing words.

CLAUSE 12

THAT, clause 12 of the Bill be amended—

- (a) by deleting paragraph (a) and substituting therefor the following new paragraph—

“(a) in subsection (1) by inserting the following new paragraph immediately after paragraph (b)—

“(ba) the making available of the sound recording in whole or in part either in its original form or in any form recognizably derived from the original.””

- (b) by inserting the following new paragraph immediately after paragraph (a)—

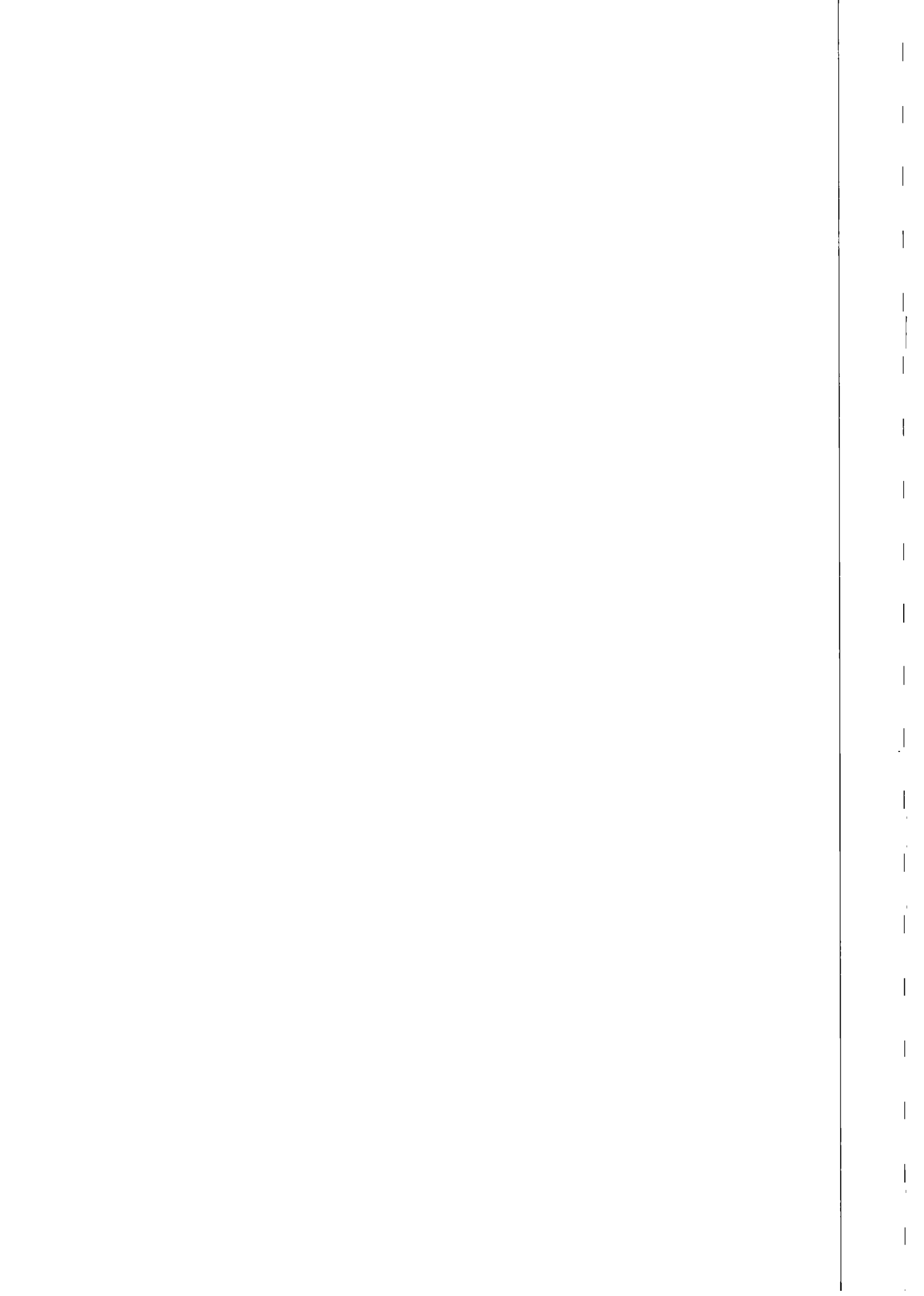
“(aa) by deleting subsection (3) and substituting therefor the following new subsection:

“(3) The rights of an owner of a copyright in a sound recording are not infringed by the making of a single copy of the recording for the personal and private use of the person making the copy; and in respect of such use the owner of copyright in the sound recording shall have the right to receive fair compensation consisting of a royalty levied on audio recording equipment or audio blank tape suitable for recording and other media intended for recording, payable at the point of first manufacture or entry in Kenya by the manufacturer or importer for commercial purposes of such equipment or media.””;

Justification:

1. To amend section 28(1) of the Act to introduce a new paragraph to include the making available of sound recordings as part of the acts that fall under the exclusive rights of a copyright owner;
2. To correct the proposed amendment to section 28(3) to align it with the proposed deletion of subsections (4) and (5).

CLAUSE 15



THAT, clause 15 of the Bill be amended in the proposed new section 30B by—

- (a) inserting the word “royalties” immediately after the word “collect” appearing in subsection (1);
- (b) inserting the word “the” immediately after the words “recordings and” appearing in subsection (3);
- (c) deleting subsection (4) and substituting therefor the following new subsection—

“(4) The Board shall determine and, by notice in the Gazette, publish the share of the private copying remuneration applicable to the respective rights holders.”

Justification:

1. To correct typographical errors; and
2. To require the Board to determine and publish the shares of the Blank tape levy that the producers and performers of sound recordings will be entitled to.

CLAUSE 17

THAT, clause 17 of the Bill be amended by inserting the following new paragraph immediately after paragraph (a)—

“(aa) in subsection (2) by deleting the words “competent authority” appearing immediately after the words “conditions as the” and substituting therefor the word “Board”;

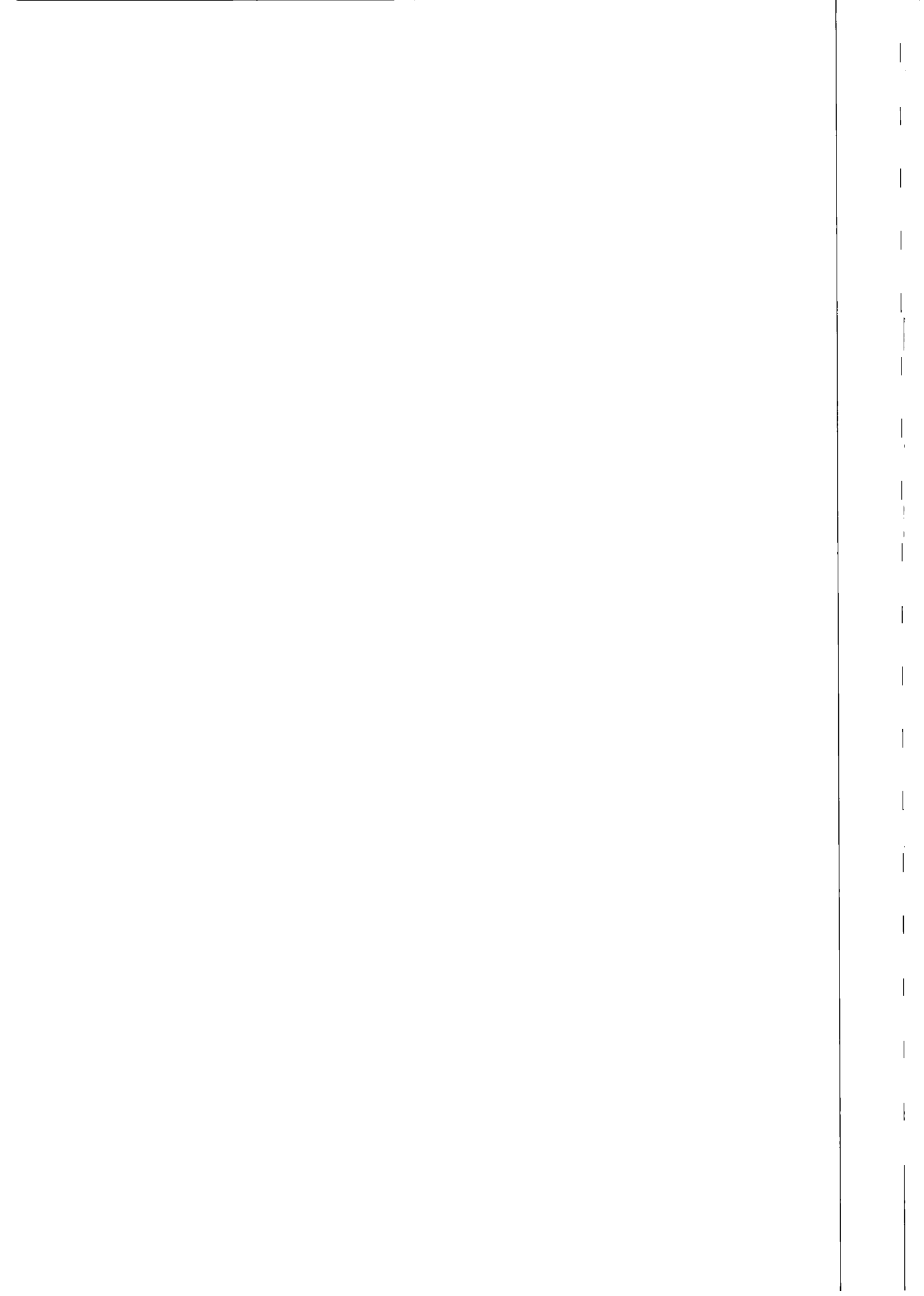
Justification:

To delete the reference to the “competent authority” in section 33A of the Act and replace it with the “Board” which was left out in the proposals contained in the Bill.

CLAUSE 18

THAT, Clause 18 of the Bill be amended—

- (a) by deleting paragraph (a) and substituting therefor the following new paragraph—
 - “(a) by deleting subsection (1) and substituting therefor the following new subsection—
 - “(1) Copyright or related rights shall be infringed by a person who, without the license of the owner of the copyright or related rights—
 - (a) does, or causes to be done, an act the doing of which is controlled by the copyright or related rights; or
 - (b) imports, or causes to be imported, otherwise than for his private and domestic use, an article which he knows to be an infringing copy.”
- (b) by inserting the following new paragraphs immediately after paragraph (b)—



“(c) in subsection (3) by deleting the word “technical” wherever it appears and substituting therefor the words “technological protection”

(d) in subsection (9) by inserting the word “dramatic” immediately after the word “literary”;

(e) in subsection (11) by inserting the word “dramatic” immediately after the word “musical”;

Justification:

1. To correct an omission in the proposed amendment to section 35(1) of the Act;
2. To delete the word “technical” and replace it with the words “technological protection” to align it with the proposed new definition of “technological protection measures”; and
3. To amend the Act to cover dramatic works under copyright and related rights.

CLAUSE 19

THAT, clause 19 of the Bill be amended—

(a) in the proposed new section 35A(1)(c)(iii) by inserting the word “business” immediately after the words “forty eight”;

(b) in the proposed new section 35B by—

(i) inserting the following new subsection immediately after subsection (3)—

“(3A) An Internet Service Provider shall, upon receipt of a valid takedown notice, notify the person responsible for making available the alleged infringing content and provide them with a copy of the notice as soon as is practicable.”

(ii) deleting subsection (4) and substituting therefor the following new subsection—

“(4) An Internet Service Provider shall disable access to the material within forty eight business hours unless it receives a counter notice fulfilling the requirements set out for a takedown notice and contesting the contents of the takedown notice.

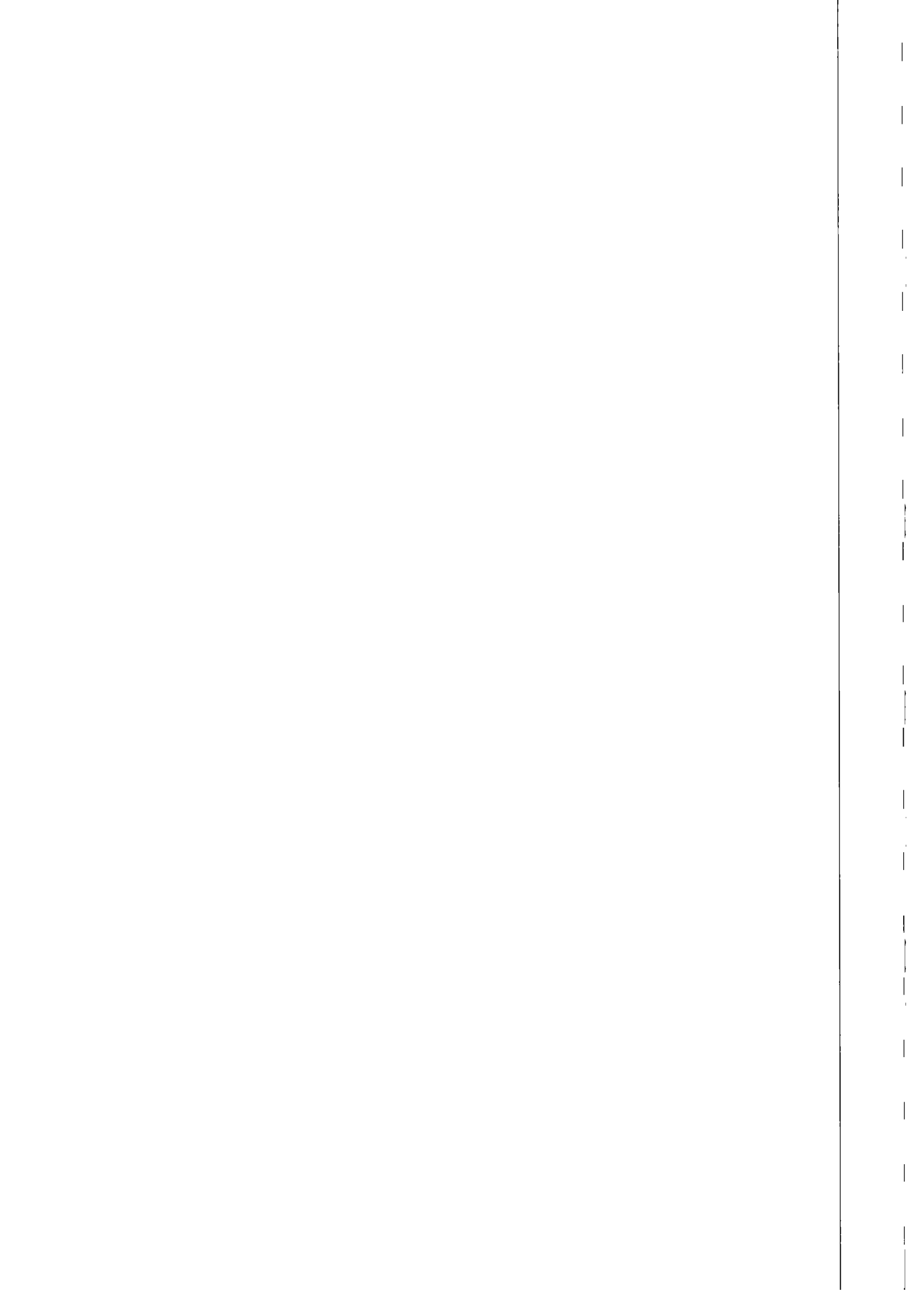
(iii) deleting the word “The” appearing in subsection (5) and substituting therefor the word “An”;

(iv) deleting subsection (6) and substituting therefor the following new subsection—

“(6) An Internet Service Provider which contravenes the provisions of subsection (4) commits an offence and shall, upon conviction, be liable to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding five years, or to both.”

(v) deleting the word “of” appearing in subsection (7) and substituting therefor the words “not exceeding”

(vi) deleting the word “The” appearing in subsection (8) and substituting therefor the word “An”;



(vii) by inserting the following new section immediately after the proposed new section 35C—

Application for
injunction.

35D. (1) A person may apply to the High Court for the grant of interim relief where he or she has reasonable grounds to believe that his or her copyright is being or may be infringed by a person situated in or outside Kenya.

(2) The High Court may, upon application under subsection (1), grant an order requiring—

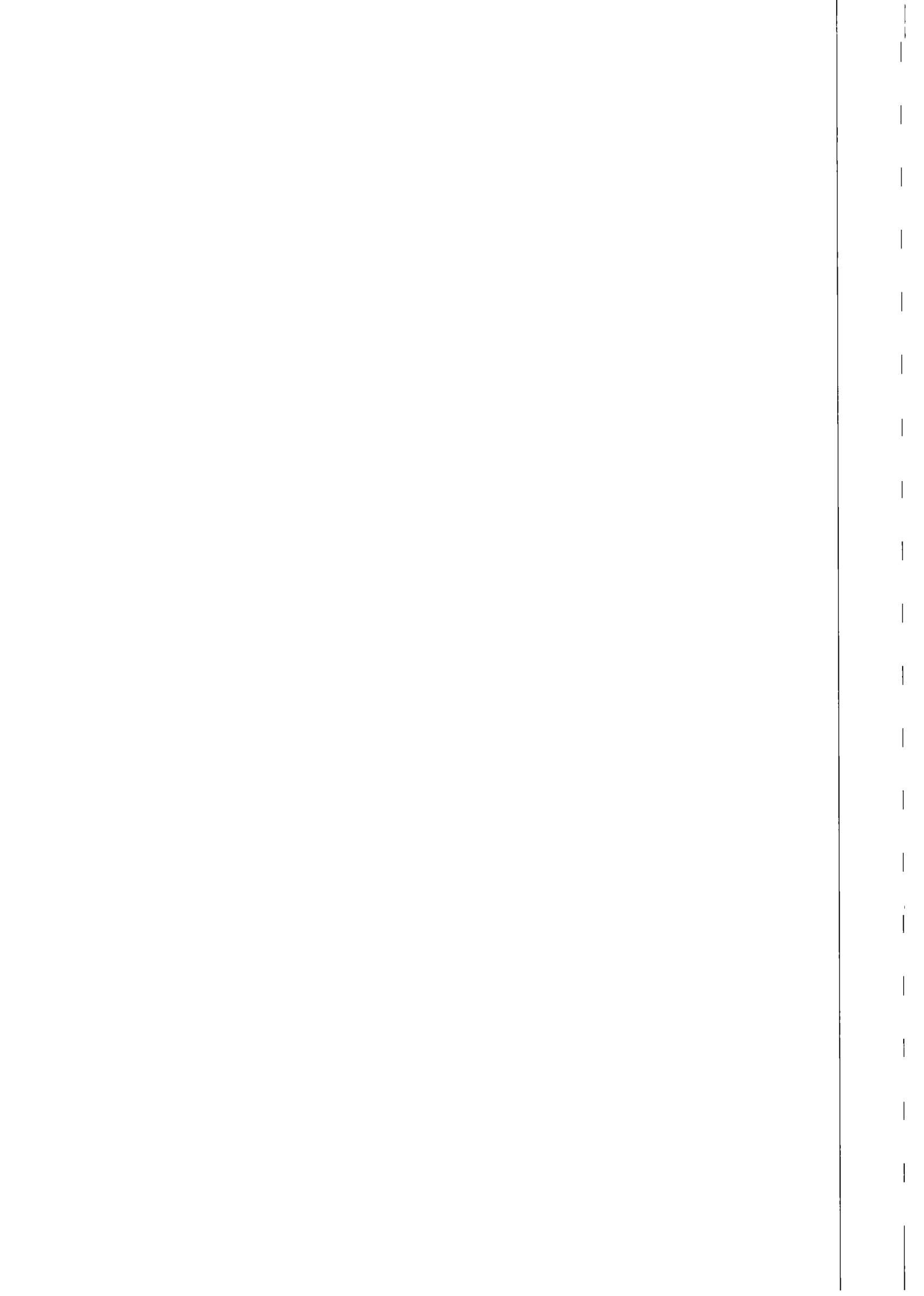
- (a) a person enabling or facilitating the infringement of copyright, or whose service is used by another person to infringe copyright, to cease such enabling or facilitating activity or disable that person's access to its service for the infringing purpose;
- (b) a person hosting or making available an online location, service or facility situated in or outside Kenya which is used to infringe copyright or which enables or facilitates the infringement of copyright, to disable access to such online location, service or facility as replaced, amended or moved from time to time; or
- (c) an internet service provider to prevent or impede the use of its service to access an online location, service or facility situated in or outside Kenya that is used to infringe copyright as replaced, amended or moved from time to time.

Justification:

1. To amend the proposed new sections 35A and 35B to require an ISP to disable access to infringing copies within forty-eight **business** hours of receiving a take-down notice;
2. To amend the proposed new sections 35B to require an ISP to notify an alleged infringer upon receipt of a valid take-down notice;
3. To amend the proposed new sections 35B to allow any person to file a counter-notice to a takedown notice;
4. To correct typographical errors;
5. To allow a person to apply to the High Court for the grant of an injunction especially with regard to live events.

CLAUSE 21

THAT, clause 21 of the Bill be amended—



(a) by deleting paragraph (a) and substituting therefor the following new paragraph—

“(a) by deleting subsection (1) and substituting therefor the following new subsection—

(1) A person who, at a time when copyright or the right of a performer or producer subsists in a work, knowingly-

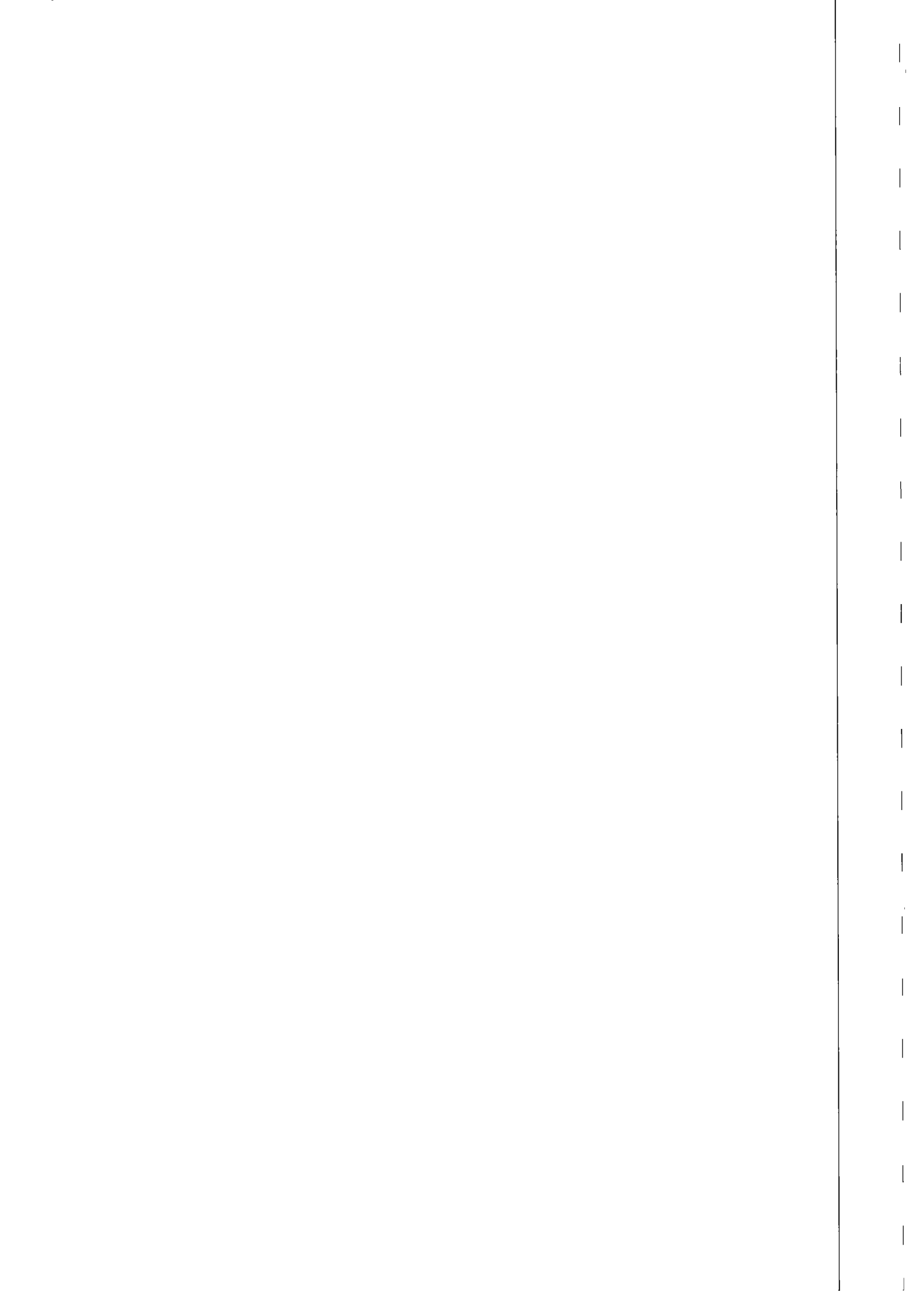
- (a) makes for sale or hire an infringing copy;
- (b) sells or lets for hire or by way of trade, exposes or offers for sale an infringing copy;
- (c) distributes infringing copies;
- (d) possesses otherwise than for his private and domestic use, an infringing copy;
- (e) imports into Kenya otherwise than for his or her private and domestic use an infringing copy;
- (f) makes or has in his or her possession a contrivance used or intended to be used for the purpose of making an infringing copy;
- (g) causes a broadcast to be rebroadcast or transmitted in a diffusion service, knowing that copyright subsists in the broadcast and that such rebroadcast or transmission constitutes an infringement of the copyright;
- (h) causes a program carrying signals to be distributed by a distributor for whom they were not intended, knowing that copyright subsists in the signals and that such distribution constitutes an infringement of the copyright;
- (i) circumvents a technological protection measure or manufactures or distributes devices designed for circumventing technological protection measures; or
- (j) removes or alters rights management information or imports or distributes, or makes available to the public a copy of a work from which electronic rights management information has been removed or altered,

commits an offence.”;

(b) in paragraph (c) by deleting the proposed new subsection (4) and substituting therefor the following subsection:

“(4) A person convicted of an offence under subsection (1) (a), (b), (c), (d) or (e) shall be liable to:

- (a) in the case of a first conviction, a fine of five times the market value of the legitimate work or one thousand shillings for each infringing



copy whichever is higher or to imprisonment for a term not exceeding ten years, or to both; and

(b) in any other case to a fine of ten times the market value of the legitimate work or two thousand shillings for each infringing copy, whichever is higher or imprisonment for a term not exceeding twenty years, or to both.”

(c) in paragraph (d) by deleting the words “Any person guilty” appearing in the proposed new subsection (5) and substituting therefor the words “A person convicted”;

(d) by deleting paragraph (e) and substituting therefor the following new paragraph—

“(e) by deleting subsection (6).”

(e) by inserting the following new paragraph immediately after paragraph (e)—

“(ea) by deleting the words “Any person guilty” appearing in subsection (7) and substituting therefor the words “A person convicted”;

Justification

1. To correct typographical errors; and
2. To harmonize conflicting penalties appearing at section 38(4) and 38(6) in relation to the same offences.

CLAUSE 22

THAT, clause 22 of the Bill be amended in the proposed new section 38A—

(a) by deleting subsection (1) and substituting therefor the following new subsection:

“(1) Where a body corporate is convicted of an offence under this Act, every person who at the time the offence was committed was in charge of or was responsible to the body corporate for the conduct of its business and affairs is also deemed to have committed the offence and shall be liable to prosecution.”

(b) by deleting subsection (2) and substituting therefor the following new subsection:

“(2) Where it is proven that a body corporate committed an offence under this Act with the consent, connivance or willful lack of due diligence by a person in charge of or responsible to the body corporate for the conduct of its business and affairs, the person shall be guilty of the offence.”

Justification

To recast the proposed new section 38A on the criminal liability for body corporates to cater for the presumption of innocence for their staff and officers as guaranteed by Article 50(2)(a) of the Constitution.

CLAUSE 24



THAT, clause 24 of the Bill be amended—

- (a) in paragraph (d) by deleting the words “shorter period” appearing immediately after the words “for a” in the proposed new subsection (3A) and substituting therefor the words “period not exceeding six months”;
- (b) by deleting paragraph (j) and substituting therefor the following new paragraph—
 - “(j) in subsection (9), by—
 - (i) inserting the words “and two daily newspapers of national circulation” immediately after the word “Gazette”;
 - (ii) deleting the words “collecting society” wherever they appear and substituting therefor the words “collective management organisation”;
- (c) in paragraph (k) by—
 - (i) deleting the proposed new subsection (10) and substituting therefor the following new subsection—
 - “(10) Before deregistering a collective management organization, the Board shall, notify the organization in writing and invite it and any of its members to make written representations against deregistration within twenty one days from the date of the notice.”
 - (ii) inserting the word “If” immediately before the word “After” appearing in the proposed new subsection (11);

Justification:

1. To amend the proposed new section 46(3A) to provide that the Board may grant a provisional licence for a period not exceeding six months;
2. To require the Board to publish the notice of deregistration of a CMO in two daily newspapers of national circulation, in addition to the Kenya Gazette;
3. To require the Board to invite representations from a CMO and its Members prior to deregistering the CMO; and
4. To correct typographical errors.

CLAUSE 25

THAT, clause 25 of the Bill be amended—

- (a) by deleting the proposed new section 46B and substituting therefor the following new section—

Qualification and
tenure of Directors and
Chairpersons of
collective management
organizations.

46B. (1) A member of a collective management organization shall be eligible for election as a director if he holds a post-secondary qualification recognized in Kenya.

(2) A director elected under this section shall serve for a term of three years and shall be eligible for re-election for one further term.



(3) A director elected as a chairperson of a collective management organization shall hold office for a term of three years and shall be eligible for re-election for one further term.

(4) A chief executive officer of a collective management organization shall hold office for a term of four years and shall be eligible for reappointment for one further term upon satisfactory performance as evaluated by the directors.

(b) by inserting the following new section immediately after the proposed new section 46C—

Submission and
publication of
information royalties.

46CA. (1) A collective management organization shall submit to the Board information on its total collection and distribution of royalties annually.

(2) The Board shall, by notice in the Gazette, publish information submitted under subsection (1).

(c) in the proposed new section 46D—

(i) by deleting subsection (1) and substituting therefor the following new subsection—

“(1) The Executive Director may authorize a person, in writing, to inspect the books of accounts and records of a collective management organization.”

(ii) by deleting the words “Any failure” appearing in subsection (3) and substituting therefor the words “A person who wilfully fails”;

(iii) by deleting subsection (4) and substituting therefor the following new subsection—

“(4) The person authorized to inspect a collective management organization shall report to the Board on—

(a) any breach or non-observance of the requirements of this Act or regulations;

(b) any irregularity in the manner of conduct of the business of the organization;

(c) any apparent mismanagement or lack of management skills in the organization; or

(d) any other matter warranting remedial action or a forensic audit.”

(iv) by deleting subsection (6) and substituting therefor the following new subsection—



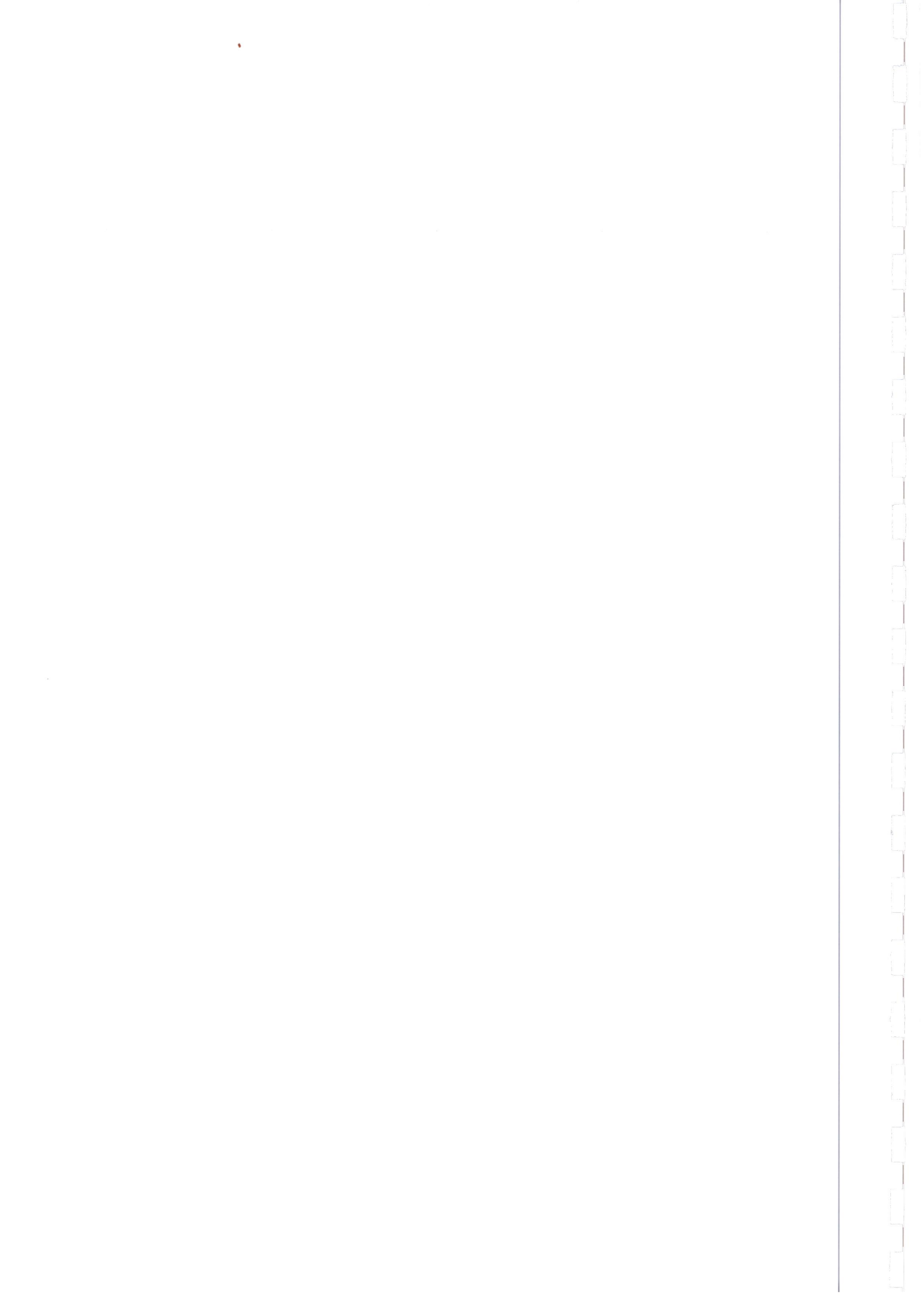
“(6) The powers conferred by subsection (1) may be exercised in the following circumstances—

- (a) where a petition for inspection has been made by not less than forty five percent of the membership specifying breach of instruments establishing the collective management organization, the regulations or the Act;
 - (b) failure by a collective management organization to account for monies to at least twenty percent of its members;
 - (c) failure by a collective management organization to offer an account of the exploitation of the copyright works assigned or licensed to it;
 - (d) where a collective management organization has acted beyond its powers in administering the rights to which it is assigned or licensed;
 - (e) where a collective management organization has altered its memorandum or other internal rules to exclude a section of its members in participating in its affairs or as to alter its core business;
 - (f) where a collective management organization has persistently failed to adhere to its set administrative budget without a reasonable cause ; or
 - (g) where a collective management organisation has failed to comply with request for information or records from its members or the Board.”
- (d) in the proposed new section 46E(1) by deleting the words “finds that an organisation conducts” appearing immediately after the word “report” in the opening statement and substituting therefor the words “that a collective management organization”;
- (e) by deleting the proposed new section 46F;
- (f) by deleting the proposed new section 46G and substituting therefor the following new section—

Record keeping and attendance of meetings by Board representatives.

46G. (1) The directors of a collective management organization shall cause minutes of all resolutions and proceedings of their meetings to be entered and updated in books kept for that purpose.

(2) The Board may, through a designated representative, attend and advise a meeting of the directors of a collective management organization where matters affecting member’s interests are proposed for discussion.



Justification:

1. To amend the proposed new section 46B to make a person with a minimum of a post-secondary qualification from a recognized institution eligible for election as a CMO director;
2. To allow CMO directors serve for a renewable three-year term and Chief Executive Officer to serve for a renewable four-year term;
3. To amend the proposed new section 46D to specify that the failure of a CMO to account to at least twenty percent of members constitutes grounds for the inspection of a its books;
4. To provide that the failure to furnish information or records that constitutes grounds for an inspection should relate to a request from KECOBO or members of a CMO;
5. To delete the proposed section 46F on “Rules” for purposes of recasting it as an amendment to section 49 of the Act which provides for regulations to be made by the Cabinet Secretary;
6. To reword the proposed section 46G for purposes of clarity; and
7. To require the annual publication of information on CMO collections and distributions.

CLAUSE 27

THAT the Bill be amended by deleting clause 27 and substituting therefor the following new clause—

Amendment
of section 48
of No. 12 of
2001.

27. The principal Act is amended by repealing section 48 and substituting therefor the following new section—

Appointment
and duties of
Copyright
Tribunal.

48. (1) There shall be a Copyright Tribunal appointed by the Chief Justice for the purpose of exercising jurisdiction under this Act where any matter requires to be determined by such Tribunal.

(2) The Copyright Tribunal shall consist of not less than three and not more than five persons, one of whom shall be an Advocate of not less than seven years standing or a person who has held judicial office in Kenya as Chairperson, appointed by the Chief Justice where any matters requires to be determined by the Tribunal.

(3) No person shall be appointed under this section, nor shall any person so appointed act as a member of the Copyright Tribunal, if he, his partner, his employer body (whether statutory or not) of which he is a member has a pecuniary interest in any matter which requires to be determined by the Tribunal

(4) Subject to subsection (5), the Copyright Tribunal shall have jurisdiction to hear



and determine—

- (a) a dispute over registration of copyright; and
- (b) an appeal against—
 - (i) the Board's refusal to grant a certificate of registration to a collective management organization;
 - (ii) imposition of unreasonable terms or conditions by the Board for the grant of a certificate of registration;
 - (iii) unreasonable refusal by a collective management organization to grant a licence in respect of a copyright work; or
 - (iv) Imposition of unreasonable terms or conditions by a collective management organization for the grant of a licence in respect of a copyright work;

(5) Before determining a matter referred to it under this section, the Copyright Tribunal shall, in accordance with such procedure as may be prescribed, give both parties an opportunity to present their respective cases, either in person or through representatives, both orally and in writing.

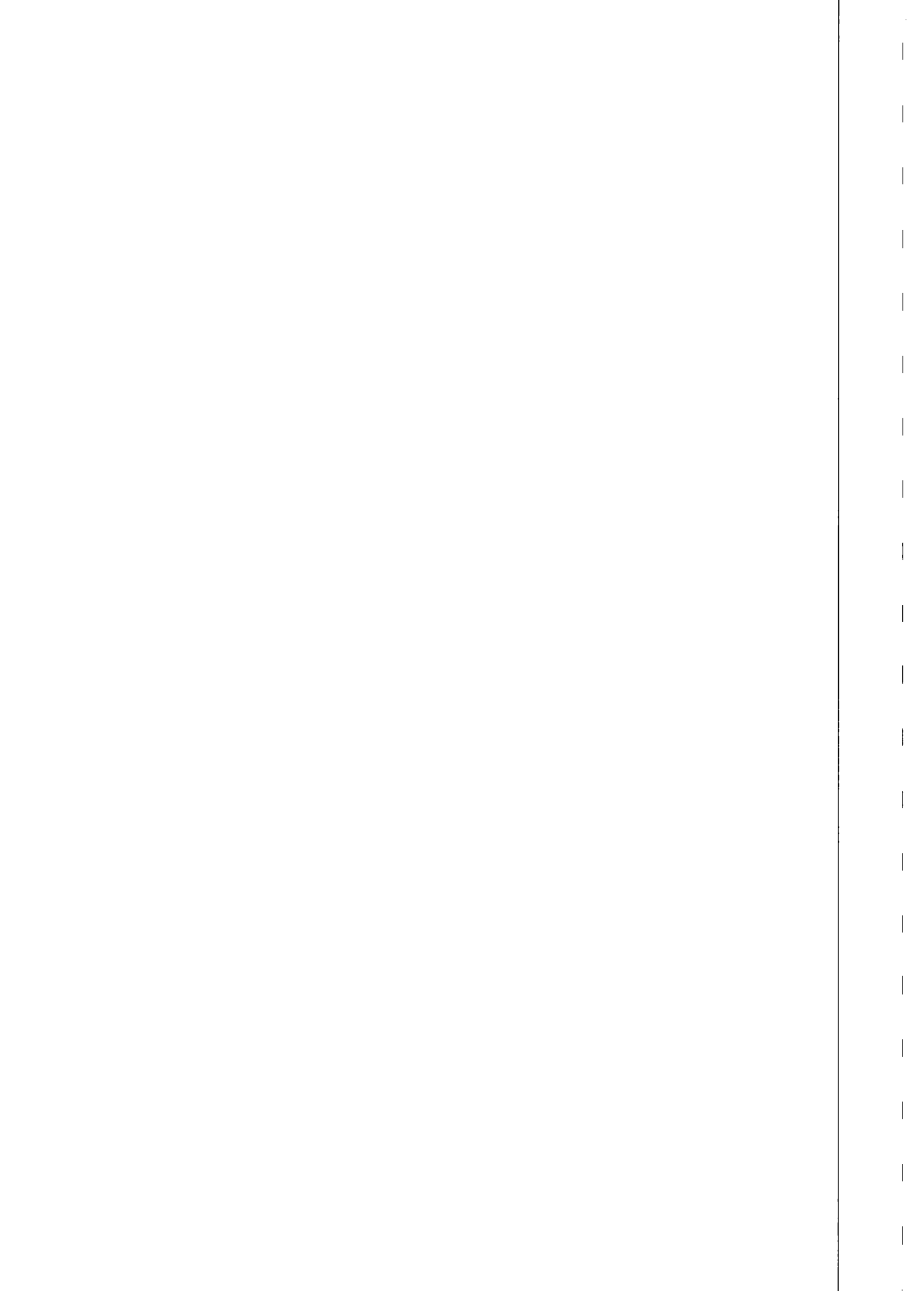
(6) The Copyright Tribunal may order the grant of a certificate of registration or the grant of a license in respect of a copyright work subject to the payment of the applicable fees.

Justification:

1. To amend section 48 of the Act to include the arbitration of disputes between right-holders in the mandate of the proposed Copyright Tribunal; and
2. To place the Tribunal under the Judiciary as contemplated under Article 169(1)(d) of the Constitution.

.CLAUSE 28

THAT, the Bill be amended by deleting clause 28 and substituting therefor the following new clause—



28. The principal Act is amended by repealing section 49 and substituting therefor the following new section—

Regulations.

49. (1) The Cabinet Secretary may make regulations generally for the better carrying into effect of the provisions of this Act, including the extension of its application.

(2) Without prejudice to the generality of subsection (1) the regulations made under this section may—

(a) prescribe—

- (i) the audit of collective management organizations;
- (ii) the annual and special general meetings of collective management organizations;
- (iii) guidelines on the gender representation and participation of persons with disability and other marginalized groups on the boards of collective management organizations;
- (iv) the procedure of handling complaints made to the Board;
- (v) ratios of distributable income to administrative costs including deductions applicable to collective management organizations;
- (vi) the manner of approval of distribution rules;
- (vii) the manner of approval of cash reserves;
- (viii) the manner of approval of membership to a collective management organization;
- (ix) a system for the identification of copyright works and monitoring of payment, collection and

distribution of royalties;
and

- (x) anything required by this Act to be prescribed;
- (b) extend the application of this Act in respect of any or all of the works referred to in section 22 (1)—
 - (i) to individuals or bodies corporate who are citizens of, domiciled or resident in or incorporated under the laws of Kenya or a country which is a party to a treaty to which Kenya is also a party and which provides for the protection of copyright and related rights in works to which the application of this Act extends;
 - (ii) to works, other than sound recordings, first published in Kenya or a country which is a party to a treaty to which Kenya is also a party and which provides for the protection of copyright and related rights in works to which the application of this Act extends; or
 - (iii) to sound recordings made or published in Kenya or a country which is a party to a treaty to which Kenya is also a party and which provides for the protection of copyright and related rights in works to which the application of this Act extends; and
- (c) restrict the right to control the translation or the reproduction of a work up to the extent permitted by any



Copyright Convention for the time being in force in Kenya:

Provided that the work belongs to or is first published or first made in or first made available to the public by individuals or bodies corporate who are citizens of, domiciled or resident in or incorporated under laws of a country which is a party to a treaty, convention or international agreement which Kenya is a party to and which provides for the protection of copyright and related rights as Kenya.

(3) For the purposes of Article 94 (6) of the Constitution—

- (a) the purpose and objective of delegation under this section is to enable the Cabinet Secretary to make regulations to provide for the better carrying into effect of the provisions of this Act and to enable the Board to discharge its functions more effectively;
- (b) the authority of the Cabinet Secretary to make regulations under this Act will be limited to bringing into effect the provisions of this Act and to fulfil the objectives specified under this section;
- (c) the principles and standards applicable to the regulations made under this section are those set out in the Interpretation and General Provisions Act and the Statutory Instruments Act, 2013.

*Cap 2,
No. 23 of 2013*

Justification

1. To amend section 49 of the Act to include the mandate contained in the proposed new section 46F as part of the Regulations to be made by the Cabinet Secretary;
2. To include the formulation of a system for the identification of copyright works and monitoring of payment, collection and distribution of royalties as part of the regulations to be made by the Cabinet Secretary;



3. To align section 49 with Article 94(6) of the Constitution on the purpose and limits of the exercise of delegated powers.

NEW CLAUSES

1. **THAT**, the Bill be amended by inserting the following new clause immediately after clause 7—

Repeal and replacement of section 21 of No. 12 of 2001.

7A. The principal Act is amended by repealing Section 21 and substituting therefor the following new section—

Appeals.

21. (1) A person aggrieved by the decision of the Board under this Act may, within sixty days from the date of the decision, appeal to the Copyright Tribunal.

(2) The Board shall provide written comments on any matter over which an appeal has been submitted to the Copyright Tribunal under this section upon request from the Copyright Tribunal.

(3) The Copyright Tribunal shall issue a decision on the appeal within thirty days from the date of such an appeal.

Justification:

To amend section 21 of the Act to delete references to the “competent Authority” and replace them with the “Copyright Tribunal” as proposed in the Bill.

2. **THAT**, the Bill be amended by inserting the following new clauses immediately after clause 9—

Amendment of section 23 of No. 12 of 2001.

9A. Section 23 of the principal Act is amended—

(a) in subsection (2) by inserting the word “dramatic” immediately after the word “musical”;

(b) in subsection (3) by inserting the word “dramatic” immediately after the word “musical”;

Amendment of section 24 of No. 12 of 2001.

9B. Section 24(1)(a) of the principal Act is amended by inserting the word “dramatic” immediately after the word “musical”.

Amendment of section 25 of No. 12 of 2001.

9C. Section 25(2) of the principal Act is amended by inserting the word “dramatic” immediately after the word “musical”.



Justification:

To amend sections 23, 24 and 25 of the Act to include dramatic works as part of the works covered under the Act.

3. THAT, the Bill be amended by inserting the following new clause immediately after clause 11—

Amendment of section 27 of No. 12 of 2001.

11A. Section 27 of the principal Act is amended—

- (a) in subsection (1) by inserting the word “dramatic” immediately after the word “musical”;
- (b) in subsection (2) by deleting the words “competent authority” appearing immediately after the words “determined by the” and substituting therefor the words “Copyright Tribunal”.

Justification:

- 1. To amend section 27 of the Act to include dramatic works as part of the works covered under the Act; and
- 2. To delete references to the “competent Authority” and replace them with the “Copyright Tribunal” as proposed in the Bill.

4. THAT, the Bill be amended by inserting the following new clause immediately after clause 20—

Amendment of section 37 of No. 12 of 2001.

20A. Section 37(1) of the principal Act is amended in the closing statement by deleting the words “competent authority” appearing immediately after the words “court or” and substituting therefor the words “Copyright Tribunal”.

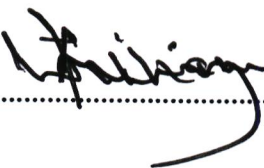
Justification:

To amend section 37 of the Act to delete references to the “competent Authority” and replace them with the “Copyright Tribunal” as proposed in the Bill.

MIN.NO/NA/CII/2018/211 ADJOURNMENT

There being no other business, the meeting was adjourned at 12.05pm

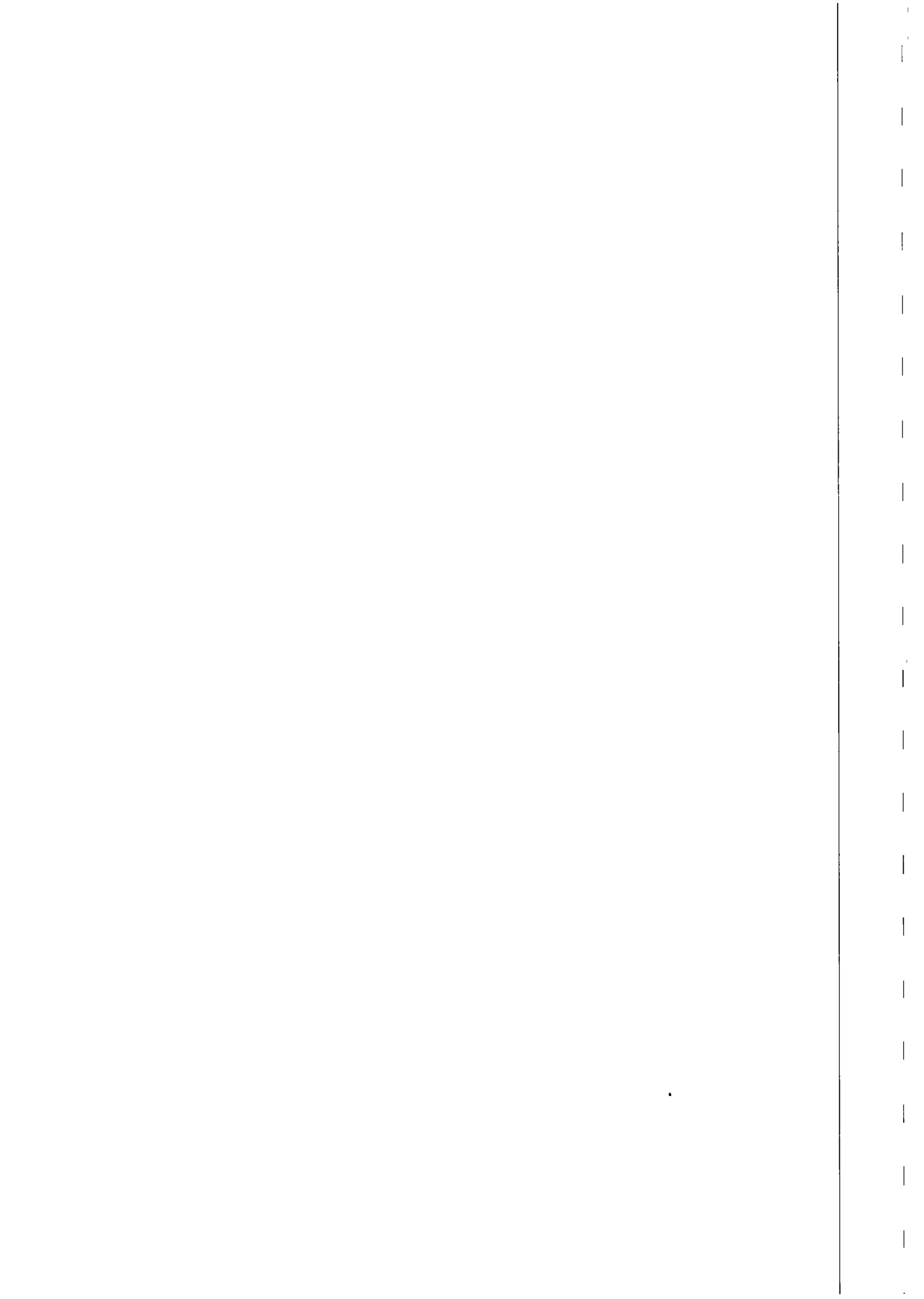
Signed.....



.....Date.....

26/06/2018

(Chairperson)



MINUTES OF THE 56TH SITTING OF THE DEPARTMENTAL COMMITTEE ON COMMUNICATION, INFORMATION AND INNOVATION HELD IN 4TH FLOOR PROTECTION HOUSE, ON MONDAY 18TH JUNE, 2018 AT 2.00PM

PRESENT

1. **Hon. William Kipkemoi, M.P.** -Chairperson
2. Hon. George Macharia Kariuki, M.P. -Vice- Chairperson
3. Hon. Jonah Mburu, M.P.
4. Hon. (Eng.). Mark Nyamita, M.P
5. Hon. Godfrey Osotsi Atieno, M.P
6. Hon. Annie Wanjiku Kibeh, M.P
7. Hon. Maritim Sylvanus, M.P
8. Hon. John Kiarie Waweru, M.P

APOLOGIES

1. Hon. Liza Chelule Chepkorir ,M.P
2. Hon. Joshua Kimilu Kivinda, M.P.
3. Hon. Mwangaza Kawira, M.P
4. Hon. Wamuchomba Gathoni, M.P
5. Hon. Innocent Momanyi Obiri, M.P
6. Hon. Mwambu Mabongah, M.P.
7. Hon. Erastus Nzioka Kivasu, M.P.
8. Hon. Anthony Tom Oluoch, M.P.
9. Hon. Gertrude Mbeyu Mwanyanje, M.P
10. Hon. Marwa Kitayama Maisori, M.P.
11. Hon. Alfah O. Miruka, M.P

National Assembly Secretariat

1. Ms Ella Kendi Clerk Assistant III
2. Mr.Ronald Walala Legal Counsel II
3. Mr.Elijah Ichwara Audio Officer
4. Mr.Albert Atunga Serjeant at arms

MIN.NO/NA/CII/2018/196: PRELIMINARIES

The meeting was called to order at thirty minutes past two o'clock followed with a word of prayer.

**MIN.NO/NA/CII/2018/197: CONSIDERATION OF THE MEMORANDA ON
COPYRIGHT (AMENDMENT) BILL, 2017**

The Legal Counsel took the Committee Members through the memoranda as follows;

Clause 26

1. The Committee agreed with the provisions of Clause 26. As at the time of concluding its report, the Committee had not received any memoranda with submissions relating to the Clause.

Clause 27

2. CEWG proposed that the clause be amended to expressly state the mandate of the Tribunal to include the arbitration of disputes between right-holders and to ensure that the tribunal is aligned with the Constitution and meets the test of fairness. The Committee agreed with the proposal that the mandate of the Tribunal include the arbitration of disputes between right-holders and noted that the Act needed to be amended to ensure that the Tribunal is domiciled in the Judiciary as contemplated under Article 169(1)(d) of the Constitution.

Clause 28

3. The Committee agreed with the provisions of Clause 28. As at the time of concluding its report, the Committee had not received any memoranda with submissions relating to the Clause.

Clause 29

4. Two memoranda received by the Committee contained submissions relating to the Clause. CEWG proposed an amendment to the proposed new Second Schedule to include the jurisprudence of the Supreme Court of Kenya in the “Digital Migration” Case on the factors which constitute fair dealing of copyright works. The Committee noted that the reasonableness of the Court decision, the proposed Second Schedule provides an adequate general guideline on fair use exemptions and any allegation of infringement would have to be proven in a case by case basis.
5. Multichoice Kenya Limited proposed an amendment to the proposed new Second Schedule to include exemptions allowing circumvention of technological protection measures. The Committee disagreed with the proposal as the Act and the proposals under the Bill only allow circumvention for purposes of fair use.

Additional proposals

6. Eleven memoranda received by the Committee contained submissions on additional proposals not covered under the Bill. These proposals included—

- (a) amendment of the Act to reintroduce an equitable remuneration right for performers and producers of sound recordings and audio-visual works;
- (b) amendment of the Act to introduce the use of a digital rights management system to ensure transparency in the collection and sharing of royalties;
- (c) amendment of section 42 of the Act to remove the power of KECOBO Officers to arrest persons for cognizable offences and hand them over to the police;
- (d) amendment of section 4 of the Act to require KECOBO to establish offices in all the Counties;
- (e) amendment of section 8 of the Act to require the conduct of the business and affairs of KECOBO to be done in line with the highest standards of ethics, integrity and good conduct;
- (f) amendment of section 9 of the Act to require the publication of the salaries and remuneration of KECOBO Members
- (g) amendment of section 19 of the Act to require the publication of KECOBO's accounts;
- (h) amendment of the Act to delete all references to the "Competent Authority" and replace them with the "Copyright Tribunal" as proposed in the Bill;
- (i) amendment of section 38 of the Act to ensure that all fines recovered with regard to a contravention of the Act be paid to the general revenue of Kenya;
- (j) amendment of the Act to prohibit payments by content promoters to broadcasters in return for favorable airplay;
- (k) amendment of the Act to provide for mandatory minimum contractual terms;
- (l) amendment of the Act to provide for a public lending right system;
- (m) amendment of the Act to de-criminalize the compilation and distribution of DJ Mixes;
- (n) amendment of the Act to extend the liability of an ISP to the blocking of Virtual Private Networks;
- (o) amendment of the Act to cater for dramatic works, in general;

- (p) amendment of the Act to provide for the delivery of one copy of a published book or newspaper to public libraries by a local publisher at their own expense; and
- (q) repeal and re-enactment of the Act.

The Committee noted that majority of the additional proposals are adequately covered under the Act. The proposal for the delivery of books and newspapers to public libraries was noted as being adequately covered by the provisions of sections 6, 7 and 8 of the Books and Newspapers Act, Cap. 111.

The Committee further noted that the Act has been amended piecemeal since its enactment in 2001 and there is need for comprehensive stakeholder discussions on its eventual repeal and re-enactment for purposes of consistency and currency of its provisions. This discussion would resolve the conflicting views held by stakeholders on matters such as the equitable remuneration right.

Presently, and in response to the additional proposals, the Committee noted that there would be need to amend the Act to:

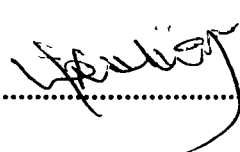
- (a) provide for the introduction of a rights management system through regulations;
- (b) delete all references to the “Competent Authority” and replace them with the “Copyright Tribunal”; and
- (c) to cater for dramatic works, in general.

MIN/NO/NA/CII/2018/198 ANY OTHER BUSINESS

The Chairperson informed the Members that the Committee was scheduled to undertake site visits to Multichoice Kenya Ltd and the Communications Authority on Friday 22nd and Monday 25th June, 2018 respectively.

MIN.NO/NA/CII/2018/199 ADJOURNMENT

There being no other business, the meeting was adjourned at 4.30pm

Signed..........Date.....26/06/2018

(Chairperson)

MINUTES OF THE 55TH SITTING OF THE DEPARTMENTAL COMMITTEE ON COMMUNICATION, INFORMATION AND INNOVATION HELD IN 4TH FLOOR PROTECTION HOUSE, ON THURSDAY 14TH JUNE, 2018 AT 11.30AM

PRESENT

1. **Hon. William Kipkemoi, M.P.** -Chairperson
2. Hon. Liza Chelule Chepkorir ,M.P
3. Hon. Joshua Kimilu Kivinda, M.P.
4. Hon. Mwangaza Kawira, M.P
5. Hon. Jonah Mburu, M.P.
6. Hon. (Eng.). Mark Nyamita, M.P
7. Hon. Godfrey Osotsi Atieno, M.P
8. Hon. Wamuchomba Gathoni, M.P
9. Hon. Maritim Sylvanus, M.P
10. Hon. Innocent Momanyi Obiri, M.P

APOLOGIES

1. Hon. George Macharia Kariuki, M.P. -Vice- Chairperson
2. Hon. Annie Wanjiku Kibeh,M.P
3. Hon. Mwambu Mabongah, M.P.
4. Hon. Erastus Nzioka Kivasu, M.P.
5. Hon. Anthony Tom Oluoch, M.P.
6. Hon. John Kiarie Waweru, M.P
7. Hon. Gertrude Mbeyu Mwanyanje, M.P
8. Hon. Marwa Kitayama Maisori, M.P.
9. Hon. Alfah O. Miruka, M.P

National Assembly Secretariat

1. Ms Ella Kendi Clerk Assistant III
2. Mr.Ronald Walala Legal Counsel II
3. Mr.Elijah Ichwara Audio Officer
4. Wilson Angatangoria Serjeant at arms

MIN.NO/NA/CII/2018/193: PRELIMINARIES

The meeting was called to order at thirty minutes past eleven o'clock followed with a word of prayer.

**MIN.NO/NA/CII/2018/194: CONSIDERATION OF THE MEMORANDA ON
COPYRIGHT (AMENDMENT) BILL, 2017**

Clause 18

1. Aga Khan University proposed an inclusion of a further amendment in the Clause to amend section 35 of the Act to replace the term “technical measure” with the term “technological protection measure” and to include dramatic works as part of the works covered by the section. The Committee agreed with this submission.

Clause 19

2. Four memoranda received by the Committee contained submissions relating to the Clause. CEWG proposed amendments to the proposed section 35A(1) to protect an Internet Service Provider (ISP) from hoax, vexatious and baseless requests to remove infringing content where the person requesting has no legal basis. It was their further submission that the proposal under the Bill which requires that ISPs comply with a take-down notice within forty-eight hours turns them into arbiters and may drag them into copyright ownership and infringement disputes. They proposed an intermediate step between the notice by the copyright owner and the action by the ISP requiring the copyright owner to obtain a court order requiring the ISP to disable access to infringing content. They further proposed amendments to the proposed new section 35B(1) to require a copyright owner to specify all web addresses and URLs that uniquely identify infringing material to prevent overbroad and non-specific take-down requests. Additionally, it was their submission that the period of forty-eight hours for effecting the takedown notices is unfair and unworkable for ISPs and that they should be allowed to take down alleged infringing material expeditiously. They further proposed that other persons apart from those accused of infringement should be allowed to file a counter-notice as the notice sent to an ISP may identify the wrong person. The Committee agreed with the proposal of other persons being allowed to file counter-notices. Additionally, the Committee noted that forty-eight working hours would be a sufficient period within which an ISP should effect a valid take-down notice.
3. Multichoice Kenya Limited proposed the addition of a new section 35C (3) to provides for automated removal of content on an urgent basis in response to notices by verified entities including the National Police Service. It was their further proposal that the Clause be amended to insert a new section 35D into the Act to allow a right-holder to move the Court for the grant of an order to pre-emptively block servers hosting illegal streams prior to a live

event. The Committee agreed with the proposal for a pre-emptive take-down of content as it would be subject to a court process.

4. Anjarwalla and Khanna proposed the amendment of the proposed new section 35B to include a process for notifying the alleged infringer of copyright to allow them time to respond to a takedown notice. The Committee agreed with this submission.
5. Aga Khan University proposed an amendment to the Clause to allow persons affected by a takedown notice to file an opposition within fourteen days and the ISP to thereafter either reject or accede to the opposition within seven days. The Committee disagreed with this proposal as it would convert an ISP into an arbiter of a copyright dispute best dealt with by the Copyright Tribunal or the Court.

Clause 20

6. The Committee agreed with the provisions of Clause 20. As at the time of concluding its report, the Committee had not received any memoranda with submissions relating to the Clause.

Clause 21

7. Two memoranda received by the Committee contained submissions relating to the Clause. KAMP proposed an amendment to section 38 to cover digital copies of copyright material and to restrict the application of the penalties prescribed under subsections (4) and (5) to particular offences. The Committee notes that definition of the term “copy” under the Act covers both physical and digital copies and that the penalties provided for under subsections (4) and (5), subject to minor amendment, apply to offences related to illegal copies and illegal transmission of broadcast, respectively.
8. Aga Khan University proposed the insertion of a new subsection immediately after section 38(4) of the Act on statutory damages in lieu of actual damages. It was their proposal that persons who do not register their copyright should not be awarded statutory damages as an incentive to encourage registration of copyright. The Committee disagreed with the proposal as the underlying premise of copyright registration is its voluntary nature.

Clause 22

9. The Committee agreed with the provisions of Clause 22 save for amendment to recast its wording. As at the time of concluding its report, the Committee had not received any memoranda with submissions relating to the Clause.

Clause 23

10. The Committee agreed with the provisions of Clause 23. As at the time of concluding its report, the Committee had not received any memoranda with submissions relating to the Clause.

Clause 24

11. Four memoranda received by the Committee contained submissions relating to the Clause. MMC proposed that the proposed new section 46(9) and (10) of the Act be amended to allow publication of the deregistration of a CMO in a daily newspaper of national circulation and to allow members of a CMO to make representations in response to a notice by KECOBO. The Committee agreed with this view as there may be an instance where a CMO is not working in the best interests of its members and members' representations would be necessary.
12. CEWG proposed the deletion of the phrase "where administrative shortfalls are apparent" in the proposed section 46(3A) as a condition for the grant of a provisional license and its replacement with "or where the Board in its discretion finds that the requirements of the Act have not been fully complied with". It was their further submission that the proposed section 46(11) be amended to specify graduated sanctions and an appeal process for CMOs. The Committee disagreed with both views as the wording used in the Bill allows the Board sufficient discretion and the sanction of deregistration is final in nature.
13. Albert Gacheru Kiarie submitted that section 46 of the Act should be amended to provide that the KECOBO should be satisfied that a CMO has the authority of the right-holders it intends to collect for before it is issued with a license. It was his further proposal that more than one CMO may be registered for a particular category of rights but only one may be licensed to collect at any given time. The Committee agreed with the proposal that KECOBO be satisfied that an entity has the authority of right-holders before registering it as a CMO. The Committee disagreed with the second proposal as it would negatively affect the freedom of association of right-holders desirous of mandating a CMO of their choice to collect royalties on their behalf.
14. RIAK submitted that the role of KECOBO should be limited to licensing and supervision of CMOs and not micromanagement. The Committee noted that the regime proposed under the Bill is not invasive and is mainly in response to the issues raised by right-holders on the (mis)management of CMOs. It does not amount to micromanagement.

Clause 25

15. Two memoranda received by the Committee contained submissions relating to the Clause. MMC proposed an amendment to the proposed section 46B of the Act to delete the words “or any other post-secondary qualification obtained after a period of at least one-month study” to increase the threshold for qualifications of directors of a CMO. They further proposed amendment of the proposed section 46C to allow CMOs to distribute royalties accruing jointly to right-holders.
16. Additionally, MMC proposed that the proposed section 46D be amended to insert a definite percentage of the number of members that failure to account to by a CMO could lead to an inspection and to clarify that the failure to comply with a request for information or records relates to the Board or the Members. On the proposed section 46G, they proposed an amendment to make it mandatory for KECOBO members to attend the CMO Board meetings. They further proposed additional provisions to cater for extended collective management schemes, ability of right-holders to pick and choose which rights to assign to more than one CMO, and the execution of agreements between right-holders and CMOs before they become members. The Committee noted that a post-secondary qualification from a recognized institution is an adequate minimum qualification for appointment as a director of a CMO. In any event, members may opt to choose persons with higher credentials. On the issue of inserting the word “jointly” the Committee noted that this could introduce confusion and the question of joint management, collection and distribution of royalties be left to agreement between the various CMOs and their members. The Committee agreed that the use of the term “significant number” is ambiguous and noted that failure to account to at least twenty percent of members constitutes grounds for the inspection of a CMOs books. The Committee was in further agreement that the failure to provide information or records that warrants grounds for an inspection should relate to a request from KECOBO or members of a CMO. The Committee disagreed with the proposal to make attendance of KECOBO members to CMO Board meeting mandatory as it could lead to conflict of interest and stretch the available KECOBO staff and resources. The Committee was of the view that the proposal to provide for extended collective management schemes unduly fetters artists freedom of association.
17. CEWG proposed the deletion of the proposed section 46B(1) arguing that the terms of service of the Chief Executive Officer of a CMO should be determined by the CMO Board and not KECOBO. It was their further proposal that CMO directors serve for a renewable three-year

term in line with *Mwongozo Principles* and that section 46B(4) on the term of service for the Chief Executive Officer be deleted for being uncertain and unpredictable. Additionally, they sought the introduction of new provisions requiring the publication of information on CMO collections and distributions. The Committee noted that section 46B does not empower KECOBO to determine the terms of service of the Chief Executive Officer of a CMO. The Committee agreed with the submissions to have CMO directors serve for a renewable three-year term and that the same apply to the term of the Chief Executive Officer. The Committee was further agreeable to the annual publication of information on CMO collections and distributions.

MIN.NO/NA/CII/2018/195 ADJOURNMENT

There being no other business, the meeting was adjourned at 1.30pm

Signed..........Date.....26/06/2018.....
(Chairperson)

MINUTES OF THE 54TH SITTING OF THE DEPARTMENTAL COMMITTEE ON COMMUNICATION, INFORMATION AND INNOVATION HELD IN 4TH FLOOR PROTECTION HOUSE, ON TUESDAY 12TH JUNE, 2018 AT 10.00AM

PRESENT

1. **Hon. William Kipkemoi, M.P.** -Chairperson
2. Hon. George Macharia Kariuki, M.P. -Vice- Chairperson
3. Hon. Erastus Nzioka Kivasu, M.P.
4. Hon. Mwambu Mabongah, M.P.
5. Hon. Anthony Tom Oluoch, M.P.
6. Hon. Maritim Sylvanus, M.P
7. Hon. Innocent Momanyi Obiri, M.P
8. Hon. Annie Wanjiku Kibeh, M.P

APOLOGIES

1. Hon. Wamuchomba Gathoni, M.P.
2. Hon. Jonah Mburu, M.P.
3. Hon. John Kiarie Waweru, M.P
4. Hon. (Eng.). Mark Nyamita, M.P
5. Hon. Gertrude Mbeyu Mwanyanje, M.P
6. Hon. Marwa Kitayama Maisori, M.P.
7. Hon. Liza Chelule Chepkorir ,M.P
8. Hon. Joshua Kimilu Kivinda, M.P.
9. Hon. Alfah O. Miruka, M.P
10. Hon. Mwangaza Kawira, M.P
11. Hon. Godfrey Osotsi Atieno, M.P

National Assembly Secretariat

1. Ms Ella Kendi Clerk Assistant III
2. Mr.Ronald Walala Legal Counsel II
3. Mr.Elijah Ichwara Audio Officer
4. Wilson Angatangoria Serjeant at arms

MIN.NO/NA/CII/2018/190: PRELIMINARIES

The meeting was called to order at twenty minutes past ten o'clock followed with a word of prayer.

**MIN.NO/NA/CII/2018/191: CONSIDERATION OF THE MEMORANDA ON
COPYRIGHT (AMENDMENT) BILL, 2017**

Clause 14

1. The Committee agreed with the provisions of Clause 14. As at the time of concluding its report, the Committee had not received any memoranda with submissions relating to the Clause.

Clause 15

2. Seven memoranda received by the Committee contained submissions relating to the Clause. CEWG proposed amendment of the proposed new section 30B to delete the reference to the Kenya Revenue Authority (KRA) as the collector of royalties on behalf of CMOs. It was their further submission that the Committee consider reinstating the former section 30A of the Act on the equitable remuneration for performers which was deleted by the Statute Law (Miscellaneous Amendments) Act, 2017.
3. KAMP also opposed the imposition of KRA as a collector of royalties and proposed the deletion and replacement of the proposed new section 30B in that regard. It was their further proposal that the proposed new section 30B (4) be amended to allow the share of the blank tape royalty among the respective right-holders be agreed by their respective CMOs instead of the same being left at the discretion of KECOBO. The Committee noted that leaving the agreement on sharing of the royalty to CMOs is imprudent as they may never agree to the detriment of artists. Further, KECOBO is best placed to determine the share as all the right-holders are represented in it.
4. Albert Gacheru Kiarie, Moses Suywa Weche, Cornelious Omwitakho Netia and Andrew Opwoko Mumia submitted against the reintroduction of the old section 30A of the Act, noting that the section was declared unconstitutional by the Malindi High Court for lack of public participation. It was the further submission of Mr. Mumia that the KRA has no mandate to collect revenue for private individuals and any attempt to have them do so is unconstitutional.
5. PHAT! Submitted that the Bill is not clear on the modalities of the collection and distribution of the Blank Tape royalty.
6. The Committee noted that the collection and distribution of the Blank tape royalty has been contentious issue since the enactment of the provision. The current provision requires collection at the point of sale which has proven problematic as traders rarely document sales

of blank media for purposes of its collection. The Bill proposes that the royalty be levied at the first point of manufacture or entry of such media in the country which the KRA is best placed to implement. In any event, the proposed section 30B provides an alternative for CMOs if they are of the view that the KRA is not a viable option.

7. With regard to the issue of the old section 30A of the Act, the Committee also noted that the issue of the reintroduction of the equitable remuneration for performers was not part of the Bill as published. Given its contentious nature which led to it being litigated in Court by competing right-holders, it would be imprudent to reintroduce it without extensive deliberation with and among the various stakeholders.

Clause 16

8. Five memoranda received by the Committee contained submissions relating to the Clause. submitted that the Clause be amended in the proposed amendments to section 33(3) to require that parties to an assignment of copyright appear before an Advocate of the High Court to have the nature of the agreement proposed to be entered into explained to them and witnessed.
9. Moses Suywa Weche, Cornelious Omwitakho Netia and Andrew Opwoko Mumia proposed the deletion of paragraph (c) of the Clause which renders an assignment invalid unless it is lodged with the KECOBO. It was their contention that the provision takes away the right of artists to contract with whomever they choose.
10. PHAT submitted that the wording of paragraph (c) of the Clause which renders an assignment invalid unless it is lodged with the KECOBO is problematic given that registration of copyright is voluntary in the first place. It was their proposal that KECOBO establish a free or affordable assignment registry instead.
11. The Committee noted that the Bill came about as a result of artists complaints of assignment of their rights without full understanding of the implication. Given the asymmetrical relationship in most instances between the artists and persons or companies proposing to purchase their rights, the Committee noted that it would be prudent to have any assignments registered for purposes of proof.

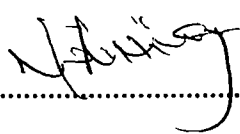
Clause 17

12. Three memoranda received by the Committee contained submissions relating to the Clause. Moses Suywa Weche, Cornelious Omwitakho Netia and Andrew Opwoko Mumia proposed the deletion of the clause arguing that the proposals in the clause take away their rights as

artists to contract with whomever they choose. The Committee disagreed with this view as the Clause relates to the granting of a license by KECOBO to applicants seeking to distribute a work withheld from the Kenyan market.

MIN.NO/NA/CII/2018/192 ADJOURNMENT

There being no other business, the meeting was adjourned at 12.05pm.

Signed..........Date.....26/06/2018.....

(Chairperson)

**MINUTES OF THE 53RD SITTING OF THE DEPARTMENTAL COMMITTEE ON
COMMUNICATION, INFORMATION AND INNOVATION HELD AT BOMA
HOTEL, NAIROBI ON TUESDAY 5TH JUNE, 2018 AT 9.00AM**

PRESENT

1. **Hon. William Kipkemoi, M.P.** -Chairperson
2. Hon. George Macharia Kariuki, M.P. -Vice- Chairperson
3. Hon. Joshua Kimilu Kivinda, M.P.
4. Hon. Erastus Nzioka Kivasu, M.P.
5. Hon. Liza Chelule Chepkorir ,M.P
6. Hon. Mwambu Mabongah, M.P.
7. Hon. Anthony Tom Oluoch, M.P.
8. Hon. (Eng.). Mark Nyamita, M.P
9. Hon. Maritim Sylvanus, M.P
10. Hon. Innocent Momanyi Obiri, M.P
11. Hon. Marwa Kitayama Maisori, M.P.
12. Hon. Annie Wanjiku Kibeh,M.P
13. Hon. Gertrude Mbeyu Mwanyanje, M.P.
14. Hon. John Kiarie Waweru, M.P

APOLOGIES

1. Hon. Wamuchomba Gathoni, M.P.
2. Hon. Jonah Mburu, M.P.
3. Hon. Alfah O. Miruka, M.P
4. Hon. Mwangaza Kawira, M.P
5. Hon. Godfrey Osotsi Atieno, M.P

National Assembly Secretariat

1. Ms Ella Kendi Clerk Assistant III
2. Mr.Ronald Walala Legal Counsel II
3. Ms.Catherine Gati Fiscal Analyst III
4. Mr.Elijah Ichwara Audio Officer
5. Wilson Angatangoria Serjeant at arms
6. Lydia Mwangi Secretary
7. Mary Atieno Office Attendant

MIN.NO/NA/CII/2018/186:

PRELIMINARIES

The meeting was called to order at twenty minutes past nine o'clock followed with a word of prayer.

The Legal Counsel took the Members through the memoranda as follows;

Clause 11

1. Five memoranda received by the Committee contained submissions relating to the Clause. Signs Media Limited proposed the insertion of a new paragraph in the proposed section 26C (1) immediately after paragraph (b) to include an exemption for persons making cover versions of previously published audio-visual recordings for use by persons with hearing impairment. The Committee noted that the principal objective of the Bill was to implement the Marrakesh Treaty with regard to exempting materials adapted for Visually Impaired Persons. In its meeting with KECOBO it was further noted that the issue of materials adapted for persons with hearing disability is still under consideration both at the local and international level and no consensus has been reached so far. Any amendment would therefore be premature.
2. CEWG proposed the insertion of the word “deliberate” immediately before the phrase “circumvention of technological measures” in the proposed new section 26B to cover innocent computer users who are compromised by third parties from being held liable for infringement. They further submitted that the Committee reconsider the introduction of the artist resale right proposed in the new section 26D as there is currently no universal consensus on the issue. It was their submission that the Committee should also consider the request by actors for a 2.5% resale right to be collected by broadcasters by CMOs. The Committee noted that the proposed amendment of section 26B is unnecessary as the proposed new section does not create an offence. With regard to the artist resale right, the Committee noted that the introduction of the right is meant to protect the most vulnerable persons in the copyright value chain. The proposal for a resale right for actors would pose a collection problem if introduced.
3. KAMP proposed amendments of the proposed new section 26B to extend its application to related rights. The Committee agreed with this submission.
4. PHAT submitted that the modalities of the implementation of the artist resale right were unclear. It was their further submission that the sale price cap of artwork above Kshs. 20,000/- needs revision as most artwork is currently sold and resold for less than that amount. The Committee noted that the proposed new section 26D allows for the licensing of a CMO

for visual artists which will be best placed to collect the royalties surrounding the resale right and that the sale price cap was adequate.

Clause 12

5. KAMP proposed amendment of section 28(1) to introduce a new paragraph to include the making available of sound recordings as part of the acts that fall under the exclusive rights of a copyright owner. It was their further submission that the section be amended to have the blank tape royalty payable at the point of “sale, manufacture or importation” of blank media. With regard to the collection of the blank tape royalty, the Committee noted that the current provision requiring collection at the point of sale has not been operationalized. The Committee agreed with the proposal to introduce a new paragraph to include the making available of sound recordings as part of the acts that fall under the exclusive rights of a copyright owner but noted that with regard to the blank tape royalty, proposal in the Bill covering both manufacture and importation is adequate.

Clause 13

6. CEWG proposed the deletion of the proposed section 29(c) relating to broadcasts and to retain the current definition of the term “broadcast”. The Committee disagreed with this view.

**MIN.NO/NA/CII/2018/188 CONSIDERATION AND ADOPTION OF THE REPORT
ON CONSIDERATION OF THE STATUTE LAW
(MISCELLANEOUS AMENDMENTS) BILL, 2018**

The Committee considered the report and adopted it with the following observations and recommendations;

Proposed amendments to the Kenya Information and Communications Act, 1998
The Committee observed that:-

- (i) Having different procedures for appointment of the Chairperson and other Board Members was inequitable.
- (ii) The issue of the selection panel being convened for the appointment or replacement of Board members had seriously hampered efforts to appoint or replace Board members. There was therefore need to establish an equitable appointment procedure which does not inordinately hamper the operations of the Authority and safeguards the independence of the Authority as required by Article 34 (5) of the Constitution.

- (iii) The criteria for appointment of members of the board by the Cabinet Secretary should take into consideration interests of all sections of society including persons with disabilities, marginalized groups and gender.

The Committee therefore recommends that the Bill be amended –

by–

- (a) inserting the following new rows immediately after the proposed amendment to section 6(1)(a)–

s. 6(1) (e) Delete the expression “in accordance with section 6B”.

s. 6 Insert the following new subsection immediately after subsection (1)–
 “(2) In appointing the members of the Board under subsection (1) (e) the Cabinet Secretary shall ensure—

- (b) deleting the proposed amendments to section 6B and substituting therefor the following new row–

- (a) that the appointees to the Board reflect the interests of all sections of society;
- (b) equal opportunities for persons with disabilities and other marginalised groups; and
- (c) that not more than two-thirds of the members are of the same gender.”

s. 6B Delete.

Rationale:

To empower the President and the Cabinet Secretary to directly appoint the Chairperson and other members of the Board, respectively. Further, to require that the cabinet secretary ensure equal representation in his or her appointments in line with Constitutional requirements on diversity, inclusion of marginalized groups and gender representation. The removal procedures set out under section 6D of the Act which requires the formation of a Tribunal will act to safeguard the independence of the Board and the Authority.

Proposed Amendments the Copyright Act, 2001

The Committee observed that:

- (i) There is need for a representative from the ICT sector to be in the board;
- (ii) The Board, when reconstituted as proposed would comprise more than two legal professionals, including the Executive Director, without any representation from the ICT sector.

Recommendations

The Committee recommends that the Bill be amended by

-inserting the following new paragraph immediately after the proposed new paragraph 6(1)(c)-

“(ca) the principal Secretary in the Ministry responsible for matters relating to information and communications technology or a designated representative”

(a) deleting the proposed new paragraph (6)(1)(f); and

(b) deleting the expression “paragraphs (1)(e) and (f)” appearing in the proposed new section 6(2) and substituting therefor the expression “paragraph (1)(e)”.

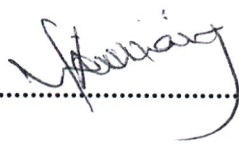
Rationale:

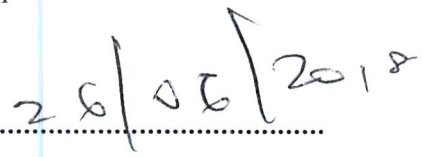
To replace the representative of the Law Society of Kenya with the Principal Secretary in the Ministry responsible for ICT in order to assist the Board in the effective discharge of its functions. The Board, as proposed to be reconstituted comprises the Attorney general or a representative and the Executive Director who is an Advocate of the High Court with proven experience in copyright matters. There is no proposed representation from the ICT sector.

MIN.NO/NA/CII/2018/189

ADJOURNMENT

There being no other business, the meeting was adjourned at 1.30pm

Signed.....

Date.....

(Chairperson)



**MINUTES OF THE 52ND SITTING OF THE DEPARTMENTAL COMMITTEE ON
COMMUNICATION, INFORMATION AND INNOVATION HELD AT BOMA
HOTEL, NAIROBI ON MONDAY 4TH JUNE, 2018 AT 2.30P.M**

PRESENT

1. **Hon. William Kipkemoi, M.P.** -Chairperson
2. Hon. George Macharia Kariuki, M.P. -Vice- Chairperson
3. Hon. Joshua Kimilu Kivinda, M.P.
4. Hon. Erastus Nzioka Kivasu, M.P.
5. Hon. Liza Chelule Chepkorir, M.P.
6. Hon. Mwambu Mabongah, M.P.
7. Hon. Anthony Tom Oluoch, M.P.
8. Hon. (Eng.). Mark Nyamita, M.P.
9. Hon. Maritim Sylvanus, M.P.
10. Hon. Innocent Momanyi Obiri, M.P.
11. Hon. Marwa Kitayama Maisori, M.P.
12. Hon. Annie Wanjiku Kibeh, M.P.
13. Hon. Gertrude Mbeyu Mwanyanje, M.P.
14. Hon. John Kiarie Waweru, M.P.

APOLOGIES

1. Hon. Wamuchomba Gathoni, M.P.
2. Hon. Jonah Mburu, M.P.
3. Hon. Alfah O. Miruka, M.P.
4. Hon. Mwangaza Kawira, M.P.
5. Hon. Godfrey Osotsi Atieno, M.P.

National Assembly Secretariat

1. Ms Ella Kendi Clerk Assistant III
2. Mr.Ronald Walala Legal Counsel II
3. Ms.Catherine Gati Fiscal Analyst III
4. Mr.Elijah Ichwara Audio Officer
5. Wilson Angatangoria Serjeant at arms
6. Lydia Mwangi Secretary
7. Mary Atieno Office Attendant

MIN.NO/NA/CII/2018/183: PRELIMINARIES

The meeting was called to order at thirty minutes past two o'clock followed with a word of prayer.

**MIN.NO/NA/CII/2018/184: CONSIDERATION OF THE MEMORANDA ON
COPYRIGHT (AMENDMENT) BILL, 2017**

The Legal Counsel took the Members through the memoranda as follows;

Clause 4

1. Creative Economy Working Group proposed that the Clause be amended with regard to the membership of KECOBO by reducing the Directors (currently twenty-one) in line with *Mwongozo Principles* and that a generic reference be used with regard to the bodies to nominate members to the Board instead of naming existing organizations.
2. The Committee noted that the issue of streamlining the membership of the Board is currently before the House in the amendments proposed to the Act in the Statute Law (Miscellaneous Amendments) Bill, 2018. As such the issue would be dealt with comprehensively during its consideration of Statute Law (Miscellaneous Amendments) Bill, 2018.

Clause 5

3. Three memoranda received by the Committee contained submissions relating to the Clause. CEWG proposed that the Clause be amended to limit the tenure of the KECOBO Executive Director to three years, renewable once, in line with *Mwongozo Principles*. Further, they opposed the requirement of a Master of Laws degree in intellectual property for one to qualify for appointment as a non-inclusive requirement.
4. Albert Gacheru Kiarie opposed the amendment, arguing that an increase in the tenure of the Executive Director may lead to abuse of the office over a long period by an irresponsible appointee.
5. KECOBO submitted that the technical requirements of the job called for the Executive Director to possess legal qualifications and that they were not opposed to the qualifications as currently contained in the Act.
6. The Committee agreed with KECOBO that the technical nature of the job requires the Executive Director to have a legal background but noted that the qualification does not necessarily have to be a master's degree in law. As such, the clause would have to be amended to allow qualified persons an opportunity to be considered for the post.

Clause 6

7. The Committee agreed with the provisions of Clause 6. As at the time of concluding its report, the Committee had not received any memoranda with submissions relating to the Clause.

Clause 7

8. The Committee agreed with the provisions of Clause 6. As at the time of concluding its report, the Committee had not received any memoranda with submissions relating to the Clause.

Clause 8

9. Aga Khan University proposed amendment of the Clause to include dramatic works as part of works eligible for copyright. The Committee agreed with the proposal.

Clause 9

10. MMC Africa Law proposed amendment of the Clause to insert new provisions immediately after the proposed section 22A of the Act. The new sections are to provide clarity as to the rights that may be recorded in the register and to outline the process of application and registration of copyright. The Committee noted that the proposal contained procedural provisions which the Cabinet Secretary under the Act is empowered to make through regulations after consultation with the necessary stakeholders.

Clause 10

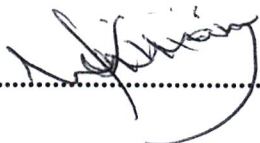
11. Albert Gacheru Kiarie proposed amendment of the proposed section 26(1) (e) and (f) of the Act to extend the nature of copyright to the communication, making available of or performance of a work in whole or substantial part either in its original form or in any form recognizably derived from the original, respectively. The Committee agreed with this submission to the extent of communication or making available of a work the public. With regard to the performance of a work in public, the Committee was of the view that the nature of that right is adequately covered under section 30 of the Act.
12. Aga Khan University proposed amendment of the Clause to extend its application to dramatic works and to delete the proposed section 26(10)(b) which is a repetition. The Committee agreed with the proposal.

MIN.NO/NA/CII/2018/185:

ADJOURNMENT

There being no other business, the meeting was adjourned at 4.30pm

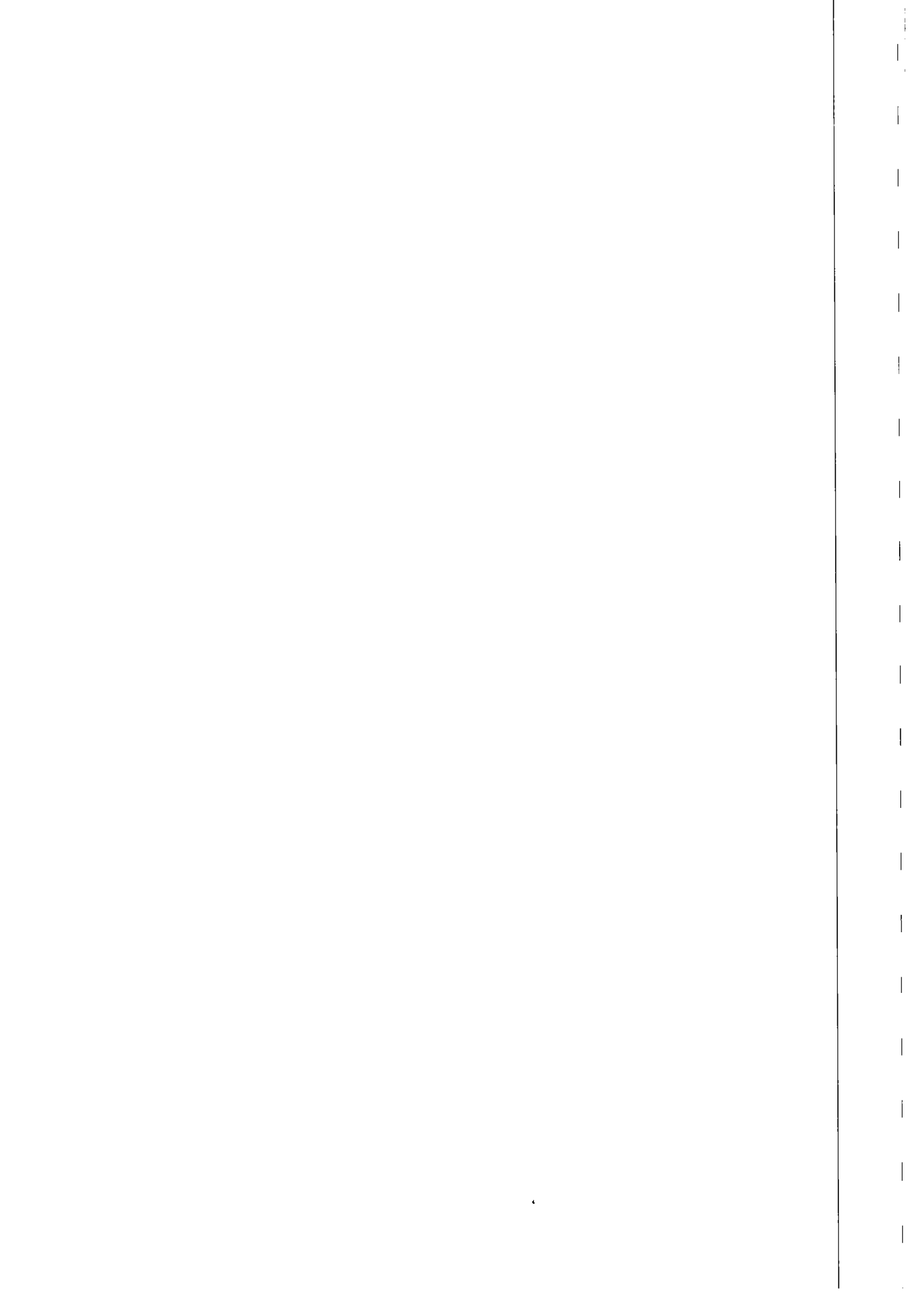
Signed.....



.....Date.....

26 / 06 / 2018

(Chairperson)



**MINUTES OF THE 51ST SITTING OF THE DEPARTMENTAL COMMITTEE ON
COMMUNICATION, INFORMATION AND INNOVATION HELD AT BOMA
HOTEL, NAIROBI ON MONDAY 4TH JUNE, 2018 AT 9.30A.M**

PRESENT

1. **Hon. William Kipkemoi, M.P.** -Chairperson
2. Hon. George Macharia Kariuki, M.P. -Vice- Chairperson
3. Hon. Joshua Kimilu Kivinda, M.P.
4. Hon. Erastus Nzioka Kivasu, M.P.
5. Hon. Liza Chelule Chepkorir ,M.P
6. Hon. Mwambu Mabongah, M.P.
7. Hon. Anthony Tom Oluoch, M.P.
8. Hon. (Eng.). Mark Nyamita, M.P
9. Hon. Maritim Sylvanus, M.P
10. Hon. Innocent Momanyi Obiri, M.P
11. Hon. Marwa Kitayama Maisori, M.P.
12. Hon. Annie Wanjiku Kibeh,M.P
13. Hon. Gertrude Mbeyu Mwanyanje, M.P.
14. Hon. John Kiarie Waweru, M.P

APOLOGIES

1. Hon. Wamuchomba Gathoni, M.P.
2. Hon. Jonah Mburu, M.P.
3. Hon. Alfah O. Miruka, M.P
4. Hon. Mwangaza Kawira, M.P
5. Hon. Godfrey Osotsi Atieno, M.P

National Assembly Secretariat

1. Ms Ella Kendi Clerk Assistant III
2. Mr.Ronald Walala Legal Counsel II
3. Ms.Catherine Gati Fiscal Analyst III
4. Mr.Elijah Ichwara Audio Officer
5. Wilson Angatangoria Serjeant at arms
6. Lydia Mwangi Secretary
7. Mary Atieno Office Attendant

Kenya Copyright Board (KECOBO)

1. Edward Sigei Executive Director
2. Isaac Rutenberg Director
3. Nywakweba George Chief Legal

- | | |
|-------------------|----------------------------|
| 4. Sharon Chahale | Deputy Chief Legal Counsel |
| 5. Faith Amatika | Legal Counsel |
| 6. Paul Kaindo | Legal Counsel |
| 7. Howard Okiror | Legal Counsel |

MIN.NO/NA/CII/2018/179 : PRELIMINARIES

The meeting was called to order at thirty minutes past nine o'clock followed with a word of prayer and introductions thereafter.

MIN.NO/NA/CII/2018/180: CONSIDERATION OF THE MEMORANDA ON COPYRIGHT (AMENDMENT) BILL, 2017

Mr Edward Sigei, the Executive Director KECOBO informed the Committee as follows;

The Bill is meant to amend the Copyright Act 2001 and bring it up to date in line with the technological developments that continue to affect the exploitation and protection of copyright works. This will ensure that Authors of Copyright works get value for their property in the digital environment.

Definitions

The Bill contains definitions of terms of three types proposed to be added to section 2 of the Copyright Act:

- a) New definitions to cater for provisions newly proposed under Bill. The new definitions are dealing with ISP Liability, Resale right for visual artists and domesticating Marrakesh Treaty.
- b) Old definitions moved from the Copyright Regulations into the main Act since they affect the proper implementation of the Act
- c) Amendments to existing terms to conform to current realities including the Constitution.

Board of Director and Executive Director Qualification

The Bill changes the titles of the members of the Board due to the provisions of the Constitution 2010 provisions especially touching on government directors under section 3 of the Copyright Act.

Section 11 of the Act and makes changes touching on the qualifications for appointment as Executive Director of the Kenya Copyright Board. The changes were prompted by Mwongozo policy provisions and the constitution of Kenya 2010.

Registration of Copyright

The Bill makes provision for Registration of Copyright Works currently missing in the Act under the proposal amending section 22 of the Act.

The Act is currently silent on this core function of the Organization. The proposal closes that gap.

Fair dealing and new rights in line with the domestication of the Marrakesh Treaty

The Bill proposes to recast section 26 to take into account the creation of new Artist resale Right, rights of visually impaired persons and extent of technical protection measures. The section makes provision for a new right for Visual artists and access to reading material by Visually Impaired Persons in line with the Marrakesh Treaty. As a result there is a new schedule added to the Act to be read with section 26 of the Act. The schedule provides details of the extent of public rights or fair dealing provisions that arise from the use of certain Copyright works. This was proposed for clarity and to expand the Copyright user rights.

Blank Media Levy

1. The Bill proposes changes to Section 28 of the Act to reflect the manner in which blank media subject of this provision generally enters the Kenyan market hence determines where the fee is paid
2. The Bill also amends section 28 and 29 by a new proviso to better provide for the collection of Blank Media Levy under section 30B.
3. The provision is intended to support the operationalization of the Blank Tape Levy provisions currently not collected as required by the current Act.

Assignments and Licenses

1. The section proposes changes to the procedure of managing Assignments and Licenses of Copyright works to better serve the interests of copyright owners as provided under section 33 of the Act. It removes the requirement to obtain letters of verification from KECOBO for assignments from abroad.
2. The provision is to provide for clarity in the management of Copyright

Internet Service Provider Liability for Online infringements

1. The Bill introduces the concept of Internet Service Provider Liability for copyright infringement online currently lacking in our Legislation. It comes with the necessary safe harbours, take down procedure and the extent of liability after the takedown notice has been served under section 35 of the Act.
2. The current law has no provisions on this matter. This will enhance enforcement noting that most of the piracy is now online. The recent experience in the case of Joe Khamis Book 'Looters and Grabbers' illustrates this lacunae.

New Copyright offences and sentences

1. The Bill provides new Copyright offences in line with the technological development and proposes new objective criteria for sentencing of convicted offenders based on value of the goods seized and the market price. It also provides for a situation where offences are committed against rights managed by collective management organizations. This is an amendment to section 38 of the Act.
2. The provision is to provide objective criteria for sentencing to manage the clamour for the raising of fines and jail terms.

Reform of the Collective Management Organization (CMO) oversight function

1. The Bill proposes name change from collecting Societies to collective management organizations in line with the international standard and to better reflect the role.
2. The Bill deals with the process of receiving and processing applications for licenses and the manner of oversight resulting from experience and calls from members of the

societies. The section also provides for the process of de-registration of such organizations. The provision amends section 46 of the Act.

3. The Bill proposes term limits and qualification of a director of a collective management organization and oversight measures that can be taken instead or before the process of de-registration begins. This is currently not provided for under the Act.
4. The Bill proposes to change the name of the Competent Authority to Copyright tribunal established under section 47 of the Act and directs for its management under the Office of the Attorney General.
5. The provisions on the supervision of CMOs have been wanting under the current legislation. The Bill makes adequate provisions to enable KECOBO intervene if member interests are threatened and allow for continued existence of the Society hence making de-registration an act of the last resort.

Following the presentations the Members raised several concerns which were responded to as follows; that;

1. It was difficult to repeal the Act due to time constraints. In addition, KECOBO was experiencing challenges on the management of CMOs regulations which needed to be addressed urgently.
2. The CEO of KECOBO must be a lawyer and a Masters degree holder based on the Mwongozo guidelines which requires that a CEO must have a minimum of a Masters degree and 10 years experience.
3. There was need to revise the definition of the word Internet Service Provider. The definition proposed by Multi Choice Kenya was appropriate.
4. The rationale of introducing resale value was to benefit the artist in his/her works. The bill requires that any resale above Kshs, 20,000 to attract 5% which will be remitted to the original owner. The 5% resale value is the best practice worldwide eg Australia.
5. The take down notice of 48 hours is sufficient however they were open to any proposal on the same.

KECOBO response on some of the proposed amendment by various stakeholders was as follows;

1. Disagreed with the proposal by Kopiken to include provision on commercial availability to Article 32(2) of the Canadian Copyright Act citing that the reading material is nearly always not commercially available in Kenya hence little value can be gained by inserting the limitation clause.
2. Proposal Kopiken on Blank media Levy to include a provision for other rights holders other than producers of sound recordings and performers to be compensated for the

copying of their works on devices and media capable of such reproduction, KECOBO cited that it was fair for other sectors to claim.

3. The proposals by Creative Economy Working Group;
 - I. Disagreed with their proposal to include definition of artist as it added no value since its not used with reference to Copyright which recognizes author as the creator.
 - II. Agreed to the proposal by Creative Economy Working Group to change the definition of the musical work to mean consisting
 - III. Agreed with the proposal to include definition of the school as set out in the Education Act.
 - IV. Agreed with the proposal to change the definition of “musical work” to mean consisting of music, irrespective of musical quality and includes any graphical notation of such work.
 - V. Disagreed with the proposal to include the word “deliberate”, non-native and user installed to read as deliberate reproduction of work in any manner or form and includes any sound or visual recording of a work and any permanent or transient storage of a work in any medium by non-native and or user-installed computer technology or any other electronic means citing that it added no value.
 - VI. Disagreed with the proposal to re-introduce the definition of “folklore” citing that the inclusion of the definition of folklore which is in public domain in Copyright terms was a mistake.
 - VII. Agreed with the proposal to delete the definition of Art Market professional as it is not used anywhere in the Bill.
 - VIII. The proposal to delete section 6(1)(a) -(j) and replace with not more than 5 nominees representative of rights owners of all works eligible for copyright would be addressed by the Statute Miscellaneous Amendment Bill.
 - IX. Agreed with the proposal to delete S 11(2)(d) and replace with a “postgraduate degree in law or related fields with demonstrable and proven experience in the field of intellectual property, particularly copyright and related rights”
 - X. The proposal to be amended appropriately to be such as the Executive Director shall hold the office for a renewable term of three years, subject to a maximum to two years. It was pointed out that as per the Mwongozo guidelines it should be 4years.
 - XI. Nature of copyright in Broadcasts; Disagreed with the proposal to delete s 29 (c) The reason given is that ‘section 2 should retain the current definition of “broadcast” in the Act to be consistent with section 22 (1) (f). The word

“broadcast” is mentioned 39 times in the Copyright Act. The proposed section is incomplete without a definition of “broadcast” which is proposed deleted in section 2 of the Bill indicating that the reasoning is not clear. The definition is modified not deleted.

- XII. Collective Administration of copyright; disagreed with the proposal to delete section 46 B (1) as it interferes unduly with CMOs citing that it cannot work as the sector requires far reaching interventions.
- XIII. Agreed with the proposal to delete 46B (4) which indicated that giving leeway for the term of CEO of a CMO will create uncertainties and unpredictability. The law should be uniform.
- XIV. Agreed with the proposal to adding a section that mandates KECOBO to regularly publish information on collection and distribution of royalties by various CMOs

Proposals by IFFRO

Second schedule B Educational Institutions; agreed with the proposal to amend the an provision in a way that makes it clear that it applies to analogue and digital uses alike, given that digital uses are more and more widespread.

Disagreed with the proposal on S.46 to include a provision dealing with settling of disputes between a licensee and an RRO indicating that the Tribunal was seized of such matters under the Act.

Proposals by Multi choice Kenya

- I. Agreed with the proposal on Section 35B to include an obligation on intermediaries to take down content and further block content on websites (local or international) that collect, index and host torrents to pirated movies and TV series or streaming websites. In S35B (4) copyright amendment Bill, 48 hours is the limit within which the ISP must take down or block access to content that is block access to content that is illegal. The window for live events (particularly sports) is usually shorter than 48 hours and so the proposed amendment may not be very effective in curbing the vice. Should be a faster and more immediate process. It is therefore proposed that a new section 35D be added to the effect that ***“the High Court may, upon application by any person who has reasonable grounds to believe that copyright may be infringed....”***
- II. Agreed with Section 1(a) and 2 on proposal to add a new section 35C (3) after 35C (2):
 - 1. An Internet Service Provider shall implement automated takedown forms that allow-
 - a) Verified owners of copyright the ability to request for the removal of infringing live streaming data immediately; or
 - b) Specifically, designate police officials the ability to remove terrorist information or content that facilitates or incites criminal actions***

2. The online automated takedown form must include, in addition to the IP address of the allegedly infringing live streaming data, fields for the required information in section 35B (2)
- III. Agreed with the proposal on Section 38 which requires the offending person to know that copyright subsists in a broadcast or signals. However, intention of infringement and knowledge are not necessary ingredients for copyright infringement. It is therefore proposed that the words “in the absence of a legal right or obligation whether in terms of this Act or any other written law” replace the requirement for knowledge.
- IV. Agreed with the proposal on Section 38A to delete the word “deemed” the section is against the presumption of innocence in Article 50(2)(a) of the constitution.
- V. Agreed with all the proposals by the Aga Khan University on Section 2
- VI. Disagreed with the proposal on Section 26(3)B which seeks to amend to include a section that excludes the use of copyright materials in an examination from copyright infringement. Also, the reproduction by a library, museum or archive for the management or maintenance of its permanent collection a copy of an original rare or out-of-print work which is deteriorating, damaged or lost or at risk of such:
 - a) Original can't be viewed due to its condition
 - b) Original is in an obsolete format due to technological advances
 - c) Restoration of the original
 - d) Police investigation or insurance

**MIN.NO/NA/CII/2018/181 CONSIDERATION OF THE STATUTE LAW
(MISCELLANEOUS AMENDMENTS) BILL 2018**

The Bill proposes to amend section 6 of the Copyright Act, 2001 to streamline the membership of the Kenya Copyright Board (KECOBO) from the current twenty-one (21) to nine (9) members.

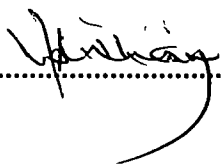
Following the presentations and deliberations, KECOBO was agreeable to the proposal subject to the inclusion of the Principal Secretary in the Ministry responsible for Information and Communications Technology (ICT) to assist the Board effectively discharge its mandate.

The Committee observed that:

1. There is need for a representative from the ICT sector to be in the board;
2. The Board, when reconstituted as proposed would comprise more than two legal professionals, including the Executive Director, without any representation from the ICT sector.

MIN.NO./NA/CII/2018/182 ANY OTHER BUSINESS

There being no other business, the meeting was adjourned at 1.30p.m.

Signed..........Date 07/06/2018
(Chairperson)

MINUTES OF THE 43RD SITTING OF THE DEPARTMENTAL COMMITTEE ON
COMMUNICATION, INFORMATION AND INNOVATION HELD IN 2ND FLOOR
CONTINENTAL HOUSE ON 17TH MAY, 2018 AT 2.00PM

PRESENT

1. Hon. William Kipkemoi, M.P. -Chairperson
2. Hon. George Macharia Kariuki, M.P. -Vice- Chairperson
3. Hon. Annie Wanjiku Kibeh, M.P.
4. Hon. Marwa Kitayama Maisori, M.P.
5. Hon. Jonah Mburu, M.P.
6. Hon. Gertrude Mbeyu Mwanyanje, M.P.
7. Hon. Godfrey Osotsi Atieno, M.P.
8. Hon. Wamuchomba Gathoni, M.P.

APOLOGIES

1. Hon. Liza Chelule Chepkorir, M.P.
2. Hon. Mwambu Mabongah, M.P.
3. Hon. Mwangaza Kawira, M.P.
4. Hon. (Eng.). Mark Nyamita, M.P.
5. Hon. Joshua Kimilu Kivinda, M.P.
6. Hon. Alfah O. Miruka, M.P.
7. Hon. Erastus Nzioka Kivasu, M.P.
8. Hon. Maritim Sylvanus, M.P.
9. Hon. John Kiarie Waweru, M.P.
10. Hon. Innocent Momanyi Obiri, M.P.
11. Hon. Anthony Tom Oluoch, M.P.

National Assembly Secretariat

1. Ms Ella Kendi Clerk Assistant
2. Mr. Sidney Lugaga Legal Counsel II
3. John Mungai Audio Officer III
4. Albert Atunga Sergeant at arms

In attendance

1. Mr. Like Muleka - Managing Director - Signs Media Kenya
2. Shem Otanga, Senior Associate - Anjarwalla & Khanna
3. Mr. Albert Gacheru, Chairperson - Music Copyright Society of Kenya

MINUTE NO. 155/2018: PRELIMINARIES

The meeting was called to order at twenty minutes past two o'clock followed with a word of prayer and introductions thereafter.

**MINUTE NO. 156/2018: CONSIDERATION OF THE MEMORANDA ON
COPYRIGHT (AMENDMENT) BILL, 2017**

The Committee was informed as follows;

2	SIGNS MEDIA KENYA LIMITED	Amend the proposed new definition of the term “work” by inserting the words “into sign language and other languages” immediately after the word “translations”	
		Amend the definition of “beneficiary person” by including a new paragraph covering deaf persons.	
		Amend the definition of “public performance” in paragraph (a) by inserting the words “sign language gesturisation” immediately after the word “acting”.	
2	ANJARWA LLA & KHANNA	We recommend the inclusion in the Bill of a definition of the term “visual artist”.	Clause 11 of the Bill proposes the creation of collective management organisations by visual artists to manage the artiste resale rights provided for under the proposed section 26D. The term “visual artists” is not defined.
		We recommend that the distinction between the terms visual art, artwork, artistic work and original work of art be clearly set out	These terms appear to have an overlap which creates a lack of clarity.
		Amend Clause 2 (f) (ii) of the Bill to insert the words “where such transmission constitutes an infringement of any rights protected by this Act; or”.	The clause does not capture the infringing nature of the transmission
	ALBERT GACHERU KIARIE	The intended amendment be shelved,	The proposed amendment to increase the tenure of the executive director of the board from 5 years to 7 years is not fair for we have experienced officers getting drunk with power the longer they stay in an office.
10	ALBERT GACHERU KIARIE	Amend the proposed section 26(1)(c) to read as follows— “the communication to the public or the whole work or asubstantial part thereof either in its original form or in any form recognizably derived from the original”	
		Amend the proposed section 26(1)(f) to read as follows— “the making available of the work Of a substantial part thereof either in its original form or in any form recognizably derived from the original”	
		Amend the proposed section 26(1) to insert a new paragraph as follows— “performance in public places of the works or a substantial part thereof either in its original form or in any form recognizably derived from the original or a	

		live performance of the works either in their original version or any other version recognizably derived from the original”	
11	SIGNS MEDIA LIMITED	<p>Insert a new paragraph in the proposed section 26C(1) immediately after paragraph (b) as follows—</p> <p>“(c) A person or firm to make cover versions and make accessible to the public previously published audio visuals into sign language for purposes of use by persons with hearing impairment, by notifying the board or collective management organization in charge of that class of works in writing, by listing down the works and the author(s).”</p>	
	ALBERT GACHERU KIARIE	Section 30A of the principal act was declared unconstitutional by the Malindi High Court. It is important that the fate of this section clearly explained as to whether it is still in force or not.	
CLAUSE 19	ANJARWALLA & KHANNA	Amend the proposed section 35B to include a process for notifying the alleged infringer of the take down notice so as to allow them to respond with a counter notice. If the accused entity does not respond within a specified time, then the takedown notice may be effected. However, if the accused entity chooses to prepare a counter notice, then the matter could be referred to the Copyright Tribunal or a Court of competent jurisdiction.	The proposed section 35B (4) contemplates the possible issuance of a counter notice by the owner of the alleged infringing content. However, it places no obligation on the ISP or the party issuing the take down notice to notify the alleged infringer of the existence of the take down notice so as to enable the alleged infringer to prepare and present the counter notice. In our view, this obligation ought to be set out in the law.
CLAUSE 24	ALBERT GACHERU KIARIE	<p>Section 46 of the principal act should be amended to provide that before a license is issued to any Collective Management Organization (CMO) the board must be satisfied that the CMO has authority from the copyright holders of the category of rights it intends to collect for by having exclusive rights from the copyright holders through deeds of assignments.</p> <p>It should also provide that before any CMO is denied license to collect royalties for its members, the board should be satisfied that the members have assigned their rights exclusively to the CMO it intends to give license in its place by having signed deeds of assignments with the other CMO and that they have revoked their deeds of assignments with their former CMO.</p>	This is to avoid giving a license to a CMO which has not been given authority to collect for a certain class of copyright holders which action would lead to infringing in the constitutional rights of the said copyright holders.
	ALBERT GACHERU KIARIE	Section 46A has not been marked for intended amendments while in my own view it requires to be amended to make it be in tandem with the Constitution by avoiding creating a gap in royalty collections which gap allows copyrighted works to be used for free contrary to the provisions of our Constitution.	

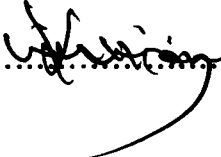
		My humble opinion is this section should provide “that pending the gazettelement of new tariffs to be used by a particular collective management organization (CMO) the previously gazetted tariffs to be applicable until the date of gazettelement of the new tariffs or the date appointed by the gazettelement to be the effective date”	
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Following the presentations the Committee was observed as follows;

1. That Signs Media is the first television in the world licensed to air sign language programmes. The Committee was in agreement that there was need for the sign language to be incorporated in the Act.
2. The Committee agreed with the proposal by Mr. Albert Gacheru which sought to amend Section 46 of the Act to provide that before the license is issued to any CMO the board must be satisfied that the CMO has the authority from the copyright holders of the category of rights it intends to collect.
3. That the Bill proposes the creation of creation of CMO by visual artists to manage the artiste resale rights provided for under the proposed section 26D, however the term visual artists is not defined in the Bill.
4. There was need to define the distinction between the terms visual art, artwork, artistic work and original work of art for clarity.

MINUTE NO.157/2018 ADJOURNMENT

There being no business, the meeting was adjourned at 4.25pm

Signed..........Date.....24/06/2018.....

Chairperson

**MINUTES OF THE 42ND SITTING OF THE DEPARTMENTAL COMMITTEE ON
COMMUNICATION, INFORMATION AND INNOVATION HELD IN 2ND FLOOR
CONTINENTAL HOUSE ON 17TH MAY, 2018 AT 10.00AM**

PRESENT

1. Hon. William Kipkemai, M.P. -Chairperson
2. Hon. George Macharia Kariuki, M.P. -Vice- Chairperson
3. Hon. Annie Wanjiku Kibeh, M.P.
4. Hon. Marwa Kitayama Maisori, M.P.
5. Hon. Jonah Mburu, M.P.
6. Hon. Godfrey Osotsi Atieno, M.P.
7. Hon. Wamuchomba Gathoni, M.P.

APOLOGIES

1. Hon. Liza Chetule Chepkorir, M.P.
2. Hon. Mwambu Mabongah, M.P.
3. Hon. Mwangaza Kawira, M.P.
4. Hon. Gertrude Mbeyu Mwanyanje, M.P.
5. Hon. (Eng.). Mark Nyamita, M.P.
6. Hon. Joshua Kimilu Kivinda, M.P.
7. Hon. Alfah O. Miruka, M.P.
8. Hon. Erastus Nzioka Kivasu, M.P.
9. Hon. Maritim Sylvanus, M.P.
10. Hon. John Kiarie Waweru, M.P.
11. Hon. Innocent Momanyi Obiri, M.P.
12. Hon. Anthony Tom Oluoch, M.P.

In attendance

National Assembly Secretariat

1. Ms Ella Kendi Clerk Assistant
2. Ms. Brigitta Kathike Legal Counsel II
3. Mr. John Mungai Audio Officer
4. Mr. Albert Atunga Serjeant at arms

Performers Rights Society of Kenya (PRISK)

1. Beatrice Achieng Chairperson
2. Irene Kariuki Actress/Director PRISK

Agakhan University

Elizabeth Oyange Copyright Associate

MMC Africa Law

Bernad Musyoka Partner

MINUTE NO. 152/2018: PRELIMINARIES

The meeting was called to order at twenty minutes past ten o'clock followed with a word of prayer and introductions thereafter.

**MINUTE NO.152/2018: CONSIDERATION OF THE MEMORANDA ON
COPYRIGHT (AMENDMENT) BILL, 2017**

The Committee was informed as follows;

	<p>PERFORMERS RIGHTS SOCIETY OF KENYA (PRISK)</p>	<p>Reintroduce the repealed Section 30A of the Copyright Act on the right to equitable remuneration of performers.</p>	<p>Equitable Remuneration Right provision is intended to protect and secure the financial interests of certain vulnerable persons in the Copyright value chain who would otherwise be compelled to sign off their rights to future remuneration for lump sum or one off payments.</p> <p>The European Union makes reference to this fact, articulating that the creative and artistic work of authors and performers necessitates an adequate income as a basis for further creative and artistic work, and the investments required particularly for the production of phonograms and films are especially high and risky. The possibility therefore of securing that income and recouping that investment can only effectively be guaranteed through adequate legal protection of the right-holders concerned, therefore necessitating an unwaivable equitable remuneration to the right-holder concerned.</p> <p>Section 30A would continue to ensure that the essential contribution performers and of sound recordings and audio-visual works make in the creation of recorded music and film works are rewarded for the broadcast and communication to the public of their works. This shall go a long way in ensuring that the creative industry is more than just a footnote in the social and economic goals outlined in Kenya's Vision 2030. By ensuring that performers and producers are economically empowered, this will give them more economic agency to continue to build the nation, as is in the footprint of the current government's manifesto and the Bill of Rights in the Constitution of Kenya.</p>
	<p>IRENE MURUGI KARIUKI</p>	<p>Reintroduce the repealed Section 30A of the Copyright Act on the right to equitable remuneration of performers.</p>	<p>Repeal of the section denied performers remuneration for work and talent that they continually render</p>
<p>CLAUSE 9</p>	<p>MMC AFRICA LAW</p>	<p>Amend proposed section 22A(1) as follows—</p> <p>“The Board shall keep and maintain a record called the Register of copyright, wherein shall be entered all registered copyright and related works with the names, addresses and description of their proprietors, notification of assignments and transmissions, the names, addresses and description of all licensees, conditions, limitations and any such other matters relating to registered copyright as may be</p>	<p>To provide clarity as to the rights that may be recorded in the register. This includes the right to absolute proprietorship, assignments, transmissions, licenses and any other limitations or conditions on relating to the registered copyright work.</p>

	<p>prescribed”</p> <p>Amend to include section 22B to on “application and registration of copyright” as follows—</p> <p>22B (1) A person claiming to be the proprietor of copyright and who is desirous of registering it shall apply in writing to the Board in the format prescribed for registration in the Register.</p> <p>(2) The Board shall examine an application for registration and consider whether the works are eligible for registration as copyright under section 22 of this Act.</p> <p>(3) Subject to the provisions of this Act, the Board may refuse the application, or may accept it absolutely or subject to such conditions or limitations as it may think right.</p> <p>(4) In the case of a refusal or conditional acceptance, the Board shall state in writing the grounds of its decision and the decision shall be subject to appeal to Copyright Tribunal.</p> <p>(5) When an application for registration of copyright has been accepted, whether absolutely or subject to conditions, or limitations, the Board shall cause the application as accepted to be advertised in the prescribed manner, and the advertisement shall set forth all conditions and limitations subject to which the application has been accepted.</p> <p>(6) Any person may, within the prescribed time from the date of the advertisement of the application, give notice in writing to the Board, stating the grounds of opposition to the registration.</p> <p>(7) The Board shall send a copy of the notice to the applicant and invite the applicant to file a response within the prescribed time, stating the grounds which he relies for his application, and if he does not do so, he shall be deemed to have abandoned his application.</p>	<p>To enhance the new proposed section 22A (2) which provides for Registration of all works eligible for copyright. It sets out the process of application and registration of copyright. The registration process introduces advertisement of any intended registration so as to invite third parties to oppose to any unlawful registration and also ensures that the public is aware of any proprietorship claims for various copyright works.</p> <p>This section also provides an avenue where parties are invited to prove ownership of the works sought to be registered prior issuance of the certificate. It also allows other parties to challenge title in copyright work where they have proof that it was obtained through fraud, illegality or misrepresentation</p>
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		<p>(8) If the Board receives a copy of a response from the applicant, it shall furnish a copy to the person giving a notice of opposition, and shall after hearing the parties if so required and considering the evidence, decide whether any registration is permitted.</p> <p>(9) The decision of the Board shall be subject to appeal to the Copyright Tribunal.</p> <p>(10) Where an application for registration of copyright in the Register has been accepted and either the application has not been opposed and the time for notice of opposition has expired; or the application has been opposed and the opposition has been decided in favor of the applicant, the Board shall unless the application has been accepted in error, register the copyright in the Register. The copyright shall be registered as of the date of the application of registration, and the date shall be deemed for the purposes of this Act to be the date of registration.</p> <p>(11) Upon registration of a copyright, the Board shall issue the applicant with a certificate of registration of the copyright in the prescribed form under the hand of the executive director and seal of the Board.</p> <p>(12) The certificate issued by the Board shall be taken by all courts as <i>prima facie</i> evidence that the person named as proprietor of copyright is the absolute owner, and title of that proprietor shall not be subject to challenge except where the certificate was obtained illegally, by fraud or misrepresentation to which the person is proved to be a party.</p>	
	AGA KHAN UNIVERSITY	Amend section 26(1) of the Act to insert the word “dramatic” immediately after the word “artistic”	
CLAUSE 10		<p>Amend section 26(1)(a) by—</p> <p>(a) deleting the word “scientific”;</p> <p>(b) deleting the words “current events” and substituting therefor the word “news”;</p> <p>(c) by inserting the word “teaching”</p>	<p>The words “scientific research” limits fair dealing to only research within the field of science thereby locking out other areas of research e.g. in humanities and social sciences;</p> <p>“current events” is too narrow as it</p>

		<p>immediately after the words “private use”;</p> <p>(d) inserting the words “or any substantial parts thereof” immediately after the word “reproduction”</p>	<p>does not include past events which may also be worth reporting. A category of News would capture the reporting of all events.</p> <p>There has been contention about certain Copyright uses in classrooms which generally should fall under teaching, and whether they can be used within the other current 4 categories of Fair Dealing. The present 4 categories are insufficient to address these types of use. Adding a new category of teaching explicitly covers the use of materials for teaching or instruction and as well as in examinations.</p>
		Amend section 26(1) of the Act by deleting paragraph (b).	The paragraph is the same as (a).
CLAUSE 6	MMC AFRICA LAW	<p>Amend the proposed amendment to section 33(3) of the Act as follows—</p> <p>Section 33 of the principal Act is amended in subsection (3) by deleting the words “and the written assignment of copyright shall be accompanied by a letter of verification from the Board in the event of an assignment of copyright works from outside Kenya” and inserting the words “as evidence of personal acceptance of that instrument Parties to this instrument shall appear before an advocate of the High Court of Kenya who shall explain to them, in a language they understand, the effect of the instrument before signing. Parties shall then sign the instrument in the presence of the advocate of the High Court of Kenya, who shall also sign and stamp a certificate to the effect that the instrument was signed in his presence having explained to the party in a language they understood and that they identified them and acknowledge that the signature appended in the document belongs to them and that they signed the documents freely having understood the contents of the instrument.”</p>	To ensure that parties to a contract clearly understand the contract before signing. This is to counter instances where parties may not understand the effect of the contract they are signing. It also imposes a duty on the advocate witnessing execution of such contracts to explain to the parties the consequences of the contract and that they freely and voluntarily agree to be bound by the contract.
CLAUSE 18	AGA KHAN UNIVERSITY	<p>Amend section 35(3) of the Act by deleting the words “technical measure” and substituting therefor the words “technological protection measure”</p> <p>Amend section 35(9) of the Act by</p>	

		inserting the word “dramatic” immediately after the word “artistic”	
		Amend section 35(11) of the Act by inserting the word “dramatic” immediately after the word “artistic”	
CLAUSE 21	AGA KHAN UNIVERSITY	Insert new subsection after Section 38 (4) on statutory damages in lieu of actual damages. Statutory damages are seen as an incentive for owners to register their copyrights with the copyright office and therefore instead of actual damages and profits, an owner can be awarded a statutory amount not less than e.g. 50,000/= and not more than 3,000,000.	Figures should be reviewed, Those who do not register their copyrights before an infringement occurred should not be able to get an award of statutory damages, this way being an incentive for registration of copyright.
24	MMC AFRICA LAW	Amend proposed section 46(10) to include the following proviso— “Provided that the Board may also invite any registered members of the organisation to make written representations in relation to such failure(s)”	The proposed subsection streamlines the deregistration process of CMOs, especially if the CMO materially prejudices its members. This may also result to punishment of the CMO by KECOBO. To facilitate effective decision-making with sufficient facts at hand, we recommend the inclusion of a proviso permitting the CMO's members to also make submissions in relation to such an investigation. This is because they are the primary stakeholders in this process and stand to be significantly affected by any decision made by KECOBO.
		Amend section 46(9) of the Act to insert the words “and in a daily newspaper of national circulation” immediately after the word “Gazette”.	The membership of CMOs may be spread considerably over the country, and inasmuch as the Kenya Gazette is presumed to be a notice to the public in Gazette and in general, it would be ideal to communicate such deregistration effectively to all the collecting society stakeholders. Publication through a daily newspaper would achieve this effectively.
25	MMC AFRICA LAW	Amend proposed section 46B(1) by deleting the words “or any other post-secondary qualification obtained after a period of at least more than one-month study”	To increase the threshold for qualification of directors of a collective management organization by ensuring directors are duly qualified and have acquired requisite leadership and governance skills.
		Amend proposed section 46C(1) by inserting the word “jointly” immediately after the word “accruing”.	The proposal of a section 46C to provide for the possibility of authors, producers, performers, visual artists and publishers forming a CMO seems to reflect the various calls by stakeholders for bringing together of the various existent CMOs. However, the language proposed here is ambiguous. The suggested revision would express this intention clearly. This would be in the

			interests of stakeholders as it would reduce the burden of liaising with different CMOs and personnel when dealing with the same type of work or related works
		Amend the proposed section 46D(6)(b) by deleting the words “significant number” and substituting therefor the words “at least five percent”	<p>The proposed powers referred to under subsection (1) is that of the Executive Director of KECOBO to order an inspection into a CMO, its book of accounts and records.</p> <p>As presently Billed, the Bill proposes that such investigation can be triggered by failure to account to "a significant number" of members. This is too ambiguous and could provide space avoiding investigation. Instead, an ascertainable proportion of thirty percent (30%) is suggested.</p>
ADDITIONAL PROPOSALS	MMC LAW AFRICA	<p>Amend Act to reintroduce the old section 30A on the right to equitable remuneration for use of sound recordings and audiovisual works as follows—</p> <p>30A. (1) If a sound recording is published for commercial purposes or a reproduction of such recording is used directly for broadcasting or other communication to the public, or is publicly performed, a single equitable remuneration for the performer and the producer of the sound recording shall be paid by the user through the respective collective management organization, and the remuneration shall be shared equally between the producer of the sound recording and the performer.</p> <p>(2) If a fixation of a performance is published for commercial purposes or a reproduction of a fixation of a performance is used for broadcasting or other communication to the public, or is publicly performed, a single equitable remuneration for the performer shall be paid by the user to the collective management organization.</p> <p>(3) The right of equitable remuneration under this section shall subsist from the date of publication of the sound recording or fixed performance until the end of the fiftieth calendar year following the year of publication, provided the sound recording or fixed performance is still protected under section 28 and 30.</p>	<p>Section 30A of the Act was deleted in the Statute Law (Miscellaneous Amendments) Act, No.11 of 2017. We propose re-introduction to ensure equitable remuneration for all artistes. This section recognizes the rights of producers and performers in sound recordings and audiovisual works. It also appreciates the role of collective management organizations who manage royalties on behalf of various stakeholders.</p>

		(4) For the purposes of this section, sound recordings and fixations of performances that have been made available by wire or wireless means in such a way that members of the public may access them from a place and a time individually chosen by them shall be considered as if they have been published for commercial purposes.		
AGA KHAN UNIVERSITY		Amend section 23(2) and (3) of the Act to insert the word “dramatic” immediately after the word “artistic”		
		Amend section 24(1)(b) of the Act to insert the word “dramatic” immediately after the word “artistic”		
		Amend section 25 of the Act to insert the word “dramatic” immediately after the word “artistic”		
		Amend section 27(1) of the Act to insert the word “dramatic” immediately after the word “artistic”		
		Delivery of books and newspapers to public libraries by a local publisher of one copy of the published book at their own expense within forty days from publication.	To expand the breadth of local works and expand author outreach within public libraries.	
		An open government licence for government works that are okay to re-use as per the specified terms.		

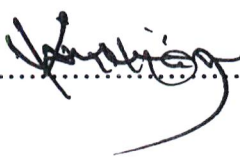
Following the presentations and the deliberations;

1. The Committee agreed with the MMC Africa Law proposal on Clause 25 which seek to increase the threshold for qualification of directors of a Collective Management Organization citing that this will ensure that the CMO get the most qualified persons for the position.
2. Section 30A of the Act was declared unconstitutional by the High Court whereby they ruled that the stakeholders were not involved and the introduction ought to have been subjected to public participation.
3. The Committee was informed that repealing of Section 30A of the Copyright Act on the right to equitable remuneration denied the performers remuneration for work and talent. Equitable remuneration right provisions is intended to protect and secure the financial interests of certain vulnerable persons in the Copyright value chain who would otherwise be compelled to sign off their rights to future remuneration for lump sum or one off payments.

4. The Committee noted that the red tape involved in releasing the money from government would be hindrance to development of the industry.
5. The Committee proposed the establishment of a Creative Welfare Fund for the pension of the artists and would be managed by the Copyright Tribunal. The funds will be financed through the levies .it was emphasized that the Fund would ensure that the artist continue to earn even after retirement.

MINUTE NO.154/2018 ADJOURNMENT

There being no business, the meeting was adjourned at 1.15pm

Signed..........Date.....14/06/2018.....
Chairperson



MINUTES OF THE 41ST SITTING OF THE DEPARTMENTAL COMMITTEE ON
COMMUNICATION, INFORMATION AND INNOVATION HELD IN 2ND FLOOR
CONTINENTAL HOUSE ON 16TH MAY, 2018 AT 2.30PM

PRESENT

1. Hon. William Kipkemoi, M.P. -Chairperson
2. Hon. Marwa Kitayama Maisori, M.P.
3. Hon. Mwambu Mabongah, M.P.
4. Hon. Mwangaza Kawira, M.P
5. Hon. Gertrude Mbeyu Mwanyanje, M.P.
6. Hon. (Eng.). Mark Nyamita, M.P
7. Hon. Jonah Mburu, M.P.
8. Hon. Godfrey Osotsi Atieno, M.P
9. Hon. Wamuchomba Gathoni, M.P.

APOLOGIES

1. Hon. George Macharia Kariuki, M.P. -Vice- Chairperson
2. Hon. Liza Chelule Chepkorir ,M.P
3. Hon. Joshua Kimilu Kivinda, M.P.
4. Hon. Alfah O. Miruka, M.P.
5. Hon. Erastus Nzioka Kivasu, M.P.
6. Hon. Maritim Sylvanus, M.P
7. Hon. John Kiarie Waweru, M.P
8. Hon. Annie Wanjiku Kibeh,M.P
9. Hon. Innocent Momanyi Obiri, M.P
10. Hon. Anthony Tom Oluoch, M.P.

National Assembly Secretariat

1. Ms Ella Kendi Clerk Assistant
2. Mr.Sidney Lugaga Legal Counsel II
3. John Mungai Audio Officer III
4. Albert Atunga Serjeant at arms

In attendance

Kenya Association of Music Producers

1. Clifford Mabele CEO Kenya Association of Music Producers
2. Anthony Karani Director

Multi choice Kenya Ltd

1. Eric Odipo Managing Director
2. Fred Saramba Anti Piracy Manager
3. Mwendwa Maundu General Manager Regulatory
4. Zingisa Tahoe General Manager Regulatory

MINUTE NO. 148/2018: PRELIMINARIES

The meeting was called to order at thirty minutes past two o'clock followed with a word of prayer and introductions thereafter.

**MINUTE NO.149/2018: CONSIDERATION OF THE MEMORANDA ON
COPYRIGHT (AMENDMENT) BILL, 2017**

Mr.Clifford Mabele the CEO, Kenya Association of Music Producers made the following presentation;

CLAUSE	PROPOSED AMENDMENT	RATIONALE
2	Amend definition of “publication” to insert the words “including works made available to the public by wire or wireless means in such a way that members of the Public can access then from a place or a time individually chosen by them immediately after the words “sound recording”.	This would cover publication of works in the online environment as well.
11	Amend proposed section 26B by inserting the words “and applies to related rights as well”.	The circumvention of technological protection measures affects all copyright and related rights and the section should be clear when read with section 28 (2).
12	Amend section 28 of the Act by inserting a new 28(1) (e) as follows— (e) the making available of sound recordings”	This will cover the current digital technologies
	Amend subsection (3) by deleting the words “manufacture or entry” and substituting with the words “sale, manufacture or importation”	
	Retain subsections (4) and (5) in the current Act but amended as follows— “(4) The level of the royalty payable under subsection (3) shall be agreed between organizations representative of producers of sound recordings and of manufacturers and importers blank media or failing such agreement by the Copyright Tribunal appointed under section 48. (5) All claims for compensation under this section shall be made through an organization representative of producers of sound recordings and the compensation shall be collected by the Board and distributed to the respective copyright collecting society registered under section 46.	Blank media or private copying levy is an important aspect of copyright and related rights as it ensures compensation of the rights holders for copies made and no royalties are collected.
	Insert the following new subsection in section 28 of the Act— “The provisions of paragraph 28 (2) (i) shall apply <i>mutatis mutandis</i> to the copyright in sound recordings”	This is an important provision as it relates to exceptions and limitations in relation to use of technological protection measures
15	Delete proposed section 30B(1) and replace with the following— “(1) Subject to s.28 & 30 of this Act, a collective management organization licensed to represent producers of sound recordings shall collect or can a body to collect on their behalf and on behalf of any other beneficiary of this right.”	We have reservations if KRA is allowed to collect considering the red tape that may arise when it comes to remitting the same. The general practice in other countries is that this right is administered by the producers of sound recordings since they are the most affected by private copying.
	Delete proposed section 30B(4) and replace with the following—	It is only fair that the affected right holders are left to decide on how they wish to share revenue realized

	“(4) The share to respective right holders to private copying remuneration shall be agreed upon by the respective collective management organizations representing producers of sound recordings and performers”	based on the best practices. The board should remain to carry out its mandate as a regulator not a participant in the process
21	Amend to delete paragraph (a) of section 38(1) of the Act and replace with the following— “(a) makes available by way of downloading, streaming, communication to the public, uploading, and storing and file sharing.”	Due to technological advancement, physical copies of sale of copyrighted works are no longer preferred. We need to realign our laws to conform to the reality. This is fundamental.
	Amend section 38(4) of the Act to restrict the application of the penalty to the new 38(1)(a) only.	
	Amend section 38(5) of the Act to apply the penalty to the offences at section 38(1) (b), (c), (d), (e) and (f)	
ADDITIONAL PROPOSES	Amend Act to insert a new section 28A on equitable remuneration for sound recordings as follows— “(1) If a sound recording published for commercial purposes, or a reproduction of such sound recording, is used directly for broadcasting or other communication to the public, or is publicly performed, a single equitable remuneration for the performer or performers and the Producer of the sound recording shall be paid by the user to the producer. (2) Unless otherwise agreed between the performer or performers and the producer, half of the amount received by the producer under subsection (1) shall be paid by the producer to the performer or performers. (3) The right to an equitable remuneration under this section shall subsist from the date of publication of the sound recording until the end of the fiftieth calendar year following the year of publication or, if the sound recording has been published, from the date of fixation of the sound recording until the end of the fiftieth calendar year following the year of fixation.	

Mr.Erick Odipo, the Managing Director, Multi Choice Kenya Limited made the following presentation;

2	Insert new subsection (k) regarding definition of “technological protection measure” regarding the definition of “school” to read (k) “technological protection measure” means any process, treatment,	
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	<p>mechanism, technology, device, system or component that in the normal course of its operation is used to prevent or restrict acts in aspect of copyright which are not authorized by the right holder of any copyright including without limitation, any access control or copy control measures.</p>	
<p>19</p>	<p>Insert a new section 35C(3) after section s35C(2) in the Bill as follows—</p> <p>35C (3) An Internet Service Provider shall implement automated takedown forms that allow—</p> <p>(a) verified owners of exclusive copyrights the ability to remove infringing</p> <p>live streaming data immediately; or</p> <p>(b) specifically designated police officials the ability to remove terrorist information or content that facilitates or incites criminal actions.</p> <p>(2) The online automated takedown form must include, in addition to the Internet Protocol address of the allegedly infringing live streaming data, fields for the required information in s358(2).</p>	<p>To automate the removal of content at a location specified in a notice filed on an urgent basis by a content rights owner or the Kenya Police Service. For instance, YouTube's Content ID system provides a model that allows verified copyright owners to remove material, rather than rely solely on YouTube to do so. Such a system would allow for fast-tracked processing of a takedown notice made under s35B of the ECT Act and/or the provisions of the Bill.</p>
	<p>Insert a new section 35D in the Bill as follows as follows—</p> <p>Order against Internet Service Providers</p> <p>35D. The High Court may, upon application by any person who has reasonable grounds to believe that copyright is being or may be infringed by any person situated inside or outside Kenya, grant any relief, including urgent relief, which it deems appropriate, including granting an order requiring—</p> <p>(a) any person who enables or facilitates the infringement of copyright, or whose service is used by any other person to infringe copyright, to cease</p>	<p>In order to allow pre-emptive blocking of servers hosting illegal streams prior to a live event.</p>

	<p>such enabling or facilitating activity or disable that person's access to its service for the infringing purpose;</p> <p>(b) any person who hosts or provides an online location, service or facility situated inside or outside Kenya which is used by any person to infringe copyright or which enables or facilitates the infringement of copyright, to disable access to such online location, service or facility as replaced, amended or moved from time to time; or</p> <p>(c) any internet service provider to prevent or impede the use of its service by any person in order to access an online location, service or facility situated inside or outside Kenya, as replaced, amended or moved from</p> <p>(d) time to time, which is used to infringe copyright."</p>	
<p>CLAUSE 29</p>	<p>Amend the proposed Second Schedule to insert the following—</p> <p>E. Technological Protection Measures</p> <p>(1) Nothing in this Act shall prevent an authorised State investigative, protective or intelligence agency using a technological protection measure circumvention device for law enforcement purposes.</p> <p>(2) Save for those persons authorised in subsection (1), any other person who wishes to use a technological protection measure circumvention device must obtain the written consent of the owner of the technological protection measure in respect of which the device is proposed to be used before doing so. Should the owner refuse, unreasonably, to grant consent to the use of the device in the manner aforesaid, that person may apply to the Copyright Tribunal for an</p>	<p>The only circumstance in which a technological protection measure circumvention device should be permitted to be used is (i) where the owner of the technological protection measure has consented to that use; (ii) for the purposes of law enforcement and (iii) where ordered by a court or the Tribunal in respect of technology protection measures.</p>

	<p>order that he or she be permitted to use the device in relation to the technological protection measure work and Copyright Tribunal may, if it is satisfied that the device is intended to be used so as to enable the person to perform an act in relation to the technological protection measure work which is permitted in terms of this Act, grant such an order on such conditions as it deems fit.”</p>	
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Following the presentation it was noted as follows;

1. Kamp indicated that if KRA was allowed to collect royalties bureaucracy may arise when it comes to remitting the same. The general practise in other Countries is that this right is administered by the producer of sound recordings since they are the most affected by private copying.
2. Piracy had greatly affected the company and had led to loss of revenues for the entire television distribution value chain and decreased investment in the communications sector.
3. There was need for the law to impose requirements on ISP to cooperate with rights holders and government to monitor illegal file sharing or streaming websites and issue warnings to end users identified in illegal file sharing.
4. The proposed Section 26B of the Bill provides that circumvention of technological Protection Measures will be permitted in limited circumstances set out in the Second Schedule of the Act. However the Second Schedule does not set out what the circumstances are.

MINUTE NO.150/2018 ANY OTHER BUSINESS

The Committee was further informed that;

Multi Choice Kenya was established as a joint venture between Multi Choice Africa Limited and the Kenya Broadcasting Corporation (KBC) , whereby KBC owns forty percent shares.

Multi Choice Kenya had established a studio for producing more content and work with local film producers to generate more local programmes to the viewers. The Committee resolved to undertake a visit to the studio.

MINUTE NO.151/2018 ADJOURNMENT

There being no business, the meeting was adjourned at 4.30pm

Signed.....*[Signature]*.....Date.....12/06/2018

Chairperson

**MINUTES OF THE 40TH SITTING OF THE DEPARTMENTAL COMMITTEE ON
COMMUNICATION, INFORMATION AND INNOVATION HELD IN 2ND FLOOR
CONTINENTAL HOUSE ON 16TH MAY, 2018 AT 10.30AM**

PRESENT

1. Hon. William Kipkemoi, M.P. -Chairperson
2. Hon. Marwa Kitayama Maisori, M.P.
3. Hon. Mwambu Mabongah, M.P.
4. Hon. Mwangaza Kawira, M.P
5. Hon. Gertrude Mbeyu Mwanyanje, M.P.
6. Hon. (Eng.). Mark Nyamita, M.P
7. Hon. Jonah Mburu, M.P.
8. Hon. Godfrey Osotsi Atieno, M.P
9. Hon. Wamuchomba Gathoni, M.P.

APOLOGIES

1. Hon. George Macharia Kariuki, M.P. -Vice- Chairperson
2. Hon. Liza Chelule Chepkorir ,M.P
3. Hon. Joshua Kimilu Kivinda, M.P.
4. Hon. Alfah O. Miruka, M.P.
5. Hon. Erastus Nzioka Kivasu, M.P.
6. Hon. Maritim Sylvanus, M.P
7. Hon. John Kiarie Waweru, M.P
8. Hon. Annie Wanjiku Kibeh,M.P
9. Hon. Innocent Momanyi Obiri, M.P
10. Hon. Anthony Tom Oluoch, M.P.

National Assembly Secretariat

1. Ms Ella Kendi Clerk Assistant
2. Mr.Sidney Lugaga Legal Counsel II
3. Mr.John Mungai Audio Officer III
4. Albert Atunga Serjeant at arms

In attendance

1. Prof.Kimani Njogu Chair Creative Economy Working Group
2. Alex Gakuru Executive Director CODE-IP TRUST
3. Wandiri Karimi Advocate
4. Emily Njeru Deputy Director Culture
5. Immaculate Juma Advocate
6. Valerie Mongare Advocate
7. Stephen Musyimi IP Lakier & Director
8. Joy Mboya The Godwin Arts Centre

MINUTE NO. 147/2018: PRELIMINARIES

The meeting was called to order at thirty minutes past ten o'clock followed with a word of prayer and introductions thereafter.

**MINUTE NO.148/2018: CONSIDERATION OF THE MEMORANDA ON
COPYRIGHT (AMENDMENT) BILL, 2017**

The Chairperson Creative Economy Working Group informed the Committee as follows;

CLAUSE	PROPOSED AMENDMENT	RATIONALE
2	Insert a new definition of “artist” as a person who creates artistic works.	To disambiguate: whereas “artistic work” is defines, the person who creates such “artistic work is undefined”
	Define “musical work” as “a work consisting of music, irrespective of musical quality, and includes any graphical notation of such work and works composed for musical accompaniment.	The proposed definition of 'musical works' does away with the words “ <i>irrespective of musical quality</i> ”. This is not advisable since these words are crucial to ensure artistic neutrality in copyright. Further, it is proposed to replace “any works composed for musical accompaniment” with “graphic notations”. Graphic notations describe the representation of music through visual symbols outside the realm of traditional music notations also referred to as “diagrammatic notations”. In as much as graphic notations is a suitable amendment to this definition, it must be noted that it does not completely substitute any works composed for musical accompaniment, which is an important inclusion in this definition. Accompaniment is the musical part or parts which provide rhythmic and or harmonic support to the melody, main themes of a song or instrumental piece that do not necessarily appear in graphic form.
	Retain the definition of “broadcast” in the Act.	The word “broadcast” is mentioned 39 times in the Act without its definition provided.
	Insert the word “broadcast” after “audio visual work” in the proposed definition of “work”	Broadcasts fall under the category of works eligible for copyright under the Act.
	Amend definition of copy to read as follows— “deliberate reproduction of work in any manner or form and includes any sound or visual recording of a work and any permanent or transient storage of a work in any medium, by non-native and or user-installed computer”	Avoid criminalising the use of the Internet which by architectural design creates transient content (cache and cookies) on every instance which lasts for a Short time or is technically necessary for Internet to function. Inserting the word “deliberate” holds the individual internet user innocent unless otherwise proven to have purposely introduced copyrighted content onto their computing equipment or devices. It also holds innocent those users whose computers are hacked, attacked by viruses, malware and other malicious, foreign installed software. Furthermore, some computers have factory-made remote access holes. The infringement burden of proof rests with the claimant NOT non-infringement burden of proof on the user. This also applies to " Technology Protection Measures ".
	Insert definition of “technology protection measures” as follows— “Non-native or user installed technological software, tools and other electronic mechanisms protect copyright on works in digital forms”	Defines “technological protection measures” and Insulates innocent users from foreign or external originated faults or infringement.
	Restore definition of “folklore”.	Folklore is Protection obligated by Article 11 of the

		<p>Constitution of Kenya.</p> <p><i>The Protection of Traditional Knowledge and Cultural Expressions Act, 2016</i> does not define “folklore”</p> <p>The Protection of Traditional Knowledge and Cultural Expressions Act, 2016 is apparently an orphan law (for which the proposed remedy is below). Deleting the definition creates room for mischief earlier corrected by law.</p>
	Amend definition of school as follows— “school” has the meaning assigned to it by the Basic Education Act, 2013, Education Act (Cap. 211), Universities Act (Cap 210B) or any other institution promoting learning and is recognised under international obligations or instruments.	<p>Defining “school” only under Basic Education Act, 2011 excludes secondary schools, universities, inter-governmental, non-governmental and non-profit organisations learning schools from copyright exceptions and limitations.(e.g. UNESCO, Commonwealth of Education, etc) recognised under ‘1’</p> <p>“authorised entity” means non-profit basis and includes a government institution or non-profit organization that provides the same services to beneficiary</p>
	Delete Second Schedule (B)	<p>This provision negates away “Fair Dealing” exceptions granted to schools. Contradictory legal provision exposes schools to suits for exercising “Fair Dealing” exception.</p> <p>Questionable logic behind "not more than one page" in view of principle of proportionality, for example, a “1 page” and a “1000-page” copyrighted Works.</p>
	Delete definition of “art market professional”	Not applied anywhere in the Bill.
3	Delete Clause 3(b)	Does introduction of “dealers” and licensing them advance or obstruct growth in copyrighted works? If it obstructs, then delete this provision. If it advances, then see (2) below. Delete not referenced anywhere.
	Amend section 5 of the Act to insert “to administer the relevant provisions of the Traditional Knowledge and Cultural Expressions Act, 2016 and any other mandate that may already be available in any other statute’ as an additional function.	The Bill should provide a definition of “dealers” under section 2 as well as a supporting regulatory framework. The Bill should include an express mandate related to the “traditional knowledge digital repository”. Given that the Traditional Knowledge Act mandates KECOBO with certain aspects of implementation, then the Copyright Act ought to reflect the same.
	Amend to insert “A Director appointed under this section shall serve for a period of three years and shall be eligible for re-election for a further single term of three years”	Aligns with <i>SCAC/Mwongozo</i> Board appointments and harmonises with Section 46B(2) on CMO Board Appointments
	Amend to insert “There shall no Conflict of interest among Board Members, Management or Staff of KECOBO.”	Conflict of Interest violates fundamental governance principles at the Board, Management and or institutional operational levels.
4	Reduce number of Board Directors (from current 21 Members) in line with <i>Mwongozo Principles</i> and Rationalise the number of Board Directors to ensure that rights holders in all works eligible for copyright are	

	represented.	
	Avoid 'hard-wiring' named external organisations into the body of the Act - the law should be more generic to outlive external entities	
5	Amend Section 11(1) of the Act by including the words: "Provided that the Executive Director shall hold office for a renewable term of three years, subject to a maximum of two terms."	<p>The process and instruments of appointment and term limit for the Executive Director ought to be in line with others Agencies and/or as advised by State Corporations Advisory Committee ("SCAC"). Therefore, the appointment should be competitive conducted by the Board after which the top two qualifying candidates are forwarded to the Cabinet Secretary for appointment of one of them.</p> <p>The appointment term should be limited to three (3) years renewable for an additional one (1) term only - Executive Director should not hold office in perpetuity.</p>
	Delete proposed section 11(2)(d) and replace with "a postgraduate degree in law or related fields with demonstrable and proven experience in the field of intellectual property, particularly copyright and related rights."	Section 11(2)(d) is non-inclusive. The proposed qualifications make it mandatory for the office holder to have a "Master of Laws degree in the field of intellectual property" may have the undesired effect of locking out other qualified intellectual property professionals that may have similar or higher qualifications in other relevant fields.
11	Insert "Deliberate" before "Circumvention of technological Measures" in Section 26(B)	Holds innocent computers users compromised by third parties technologies without their knowledge or intent. Burden of proof rests on complainant.(see also "Copy" under interpretations)
	Consider implications of 26(D)	Resale Rights: The proposed section introduces the artist resale right. While a resale right, or " <i>droit de suite</i> ", has been introduced in a number of European jurisdictions, there is no universal consensus on its benefits, even for the artists it supposedly seeks to benefit. What empirical evidence is there to suggest that the Kenyan art market, and indeed artists, would benefit from a resale right? Consider Actors request of a 2.5% resale rights to be collected from broadcasters by CMOs on their behalf, extend to resale of diverse other property.
	Insert the following immediately after s26(j) of the Act— "Provided that subject to the provisions of this section the owner may elect to use open licenses such as creative commons, free and open source licenses and open educational resources."	Exceptions and limitation ought to be incorporated and enforcement cognizant of these rights under copyright law.
13	Delete the proposed Section 29(c)	Section 2 should retain the current definition of "broadcast" in the Act to be consistent with section 22 (1) (f). The word "broadcast" is mentioned 39 times in the Act. The proposed section is incomplete without a definition of "broadcast" which is proposed deleted in section 2 of the Bill.

15	Delete the words “Kenya Revenue Authority” and replace with “a private company or any other similar entity designated by KECOBO to collect royalties with respect to single equitable remuneration”	Burdening tax-funded public entities which perform public services with the collection of private property revenues/royalties is in our view, improper. Thus KRA must be relieved of the duty of collecting royalties.
	Replace the words “Section 30B” with “Section 30A”.	Section 30A on single equitable remuneration was deleted by the Statute Law Miscellaneous Amendments Act, 2017. The entity designated by KECOBO should collect for all rights under collective management organisations. Therefore amendments should apply for copyright and related rights under sections 26, 27 and 28 in line with the recommendations by the Presidential Task force on Parastatal Reforms.
	Consider reinstating Section 30A which was deleted by the Statute Law Miscellaneous Amendments Act, 2017 to take care of weak entities in the Copyright value chain	
19	<p>Rephrase Section 35A(1) as follows—</p> <p>(1) An Internet Service Provider shall not be liable— for damages incurred by a person if the service provider refers or links users to a webpage containing infringing material or facilitates infringing activity, by using information location tools including a directory, index, reference, pointer or hyperlink where the Internet Service Provider—</p> <ul style="list-style-type: none"> (i) does not have actual knowledge that the material is infringing the rights of that person; (ii) is not aware of the facts or circumstances from which the allegedly infringing activity or infringing nature of the material is not apparent; (iii) removes or disables access to, the reference or link to the content or the infringing activity after being informed that the content or the activity infringes rights of a person [in accordance with section 35B] <p>The impugned websites will have the right to file counter notices with the ISPs. The Bill is however silent on what the ISP is to do in case a counter notice is filed.</p> <p>The Bill does not anticipate competing claims. It is therefore possible for an ISP to be dragged into copyright ownership and infringement disputes. This is especially so because of the</p>	<p>Need to protect ISPs from hoax, vexatious and baseless requests to remove content and/or where the person requesting the removal has no legal basis.</p> <p>Our proposed amendment will ensure that the person lodging the take down notice will ensure that the notice complies with the criteria set out in section 35B for take-down requests</p> <p>The proposal in the Bill turns ISPs into arbiters - to consider requests from persons claiming to be copyright owners and peruse the affidavits on ownership and on the attempts made to contact the websites hosting the infringing material. It is therefore possible for an ISP to be dragged into copyright ownership and infringement disputes. This is especially so because of the provision on enforcement that requires compliance with a takedown notice, malicious or not, within 48 hours.</p> <p>An intermediate step should be introduced between notice by the copyright owner and action by the ISP. This middle step would require the copyright owners to obtain an injunction order from the court. Thus it is the court that would instruct the ISPs to disable access to infringing content</p>

	<p>provision on enforcement that requires compliance with a takedown notice, malicious or not, within 48 hours.</p>	
	<p>Rephrase Section 35B(1) to—</p> <p>(1) A person whose rights have been infringed by content to which access is being offered by an Internet Service Provider may request, by way of a takedown notice, that Internet Service Provider removes the infringing content.</p> <p>(2) A takedown notice issued under subsection (1) shall—</p> <p>(a) be in writing and addressed by complainant or his agent to the Internet Service Provider or their designated agent;</p> <p>(b) contain the full names and telephone, physical and email address of the complainant;</p> <p>(c) be signed by the complainant or his authorized agent;</p> <p>(d) describe in specific detail the copyright work subject to the alleged infringement or sought to be removed;</p> <p>(e) identify the rights being infringed;</p> <p>(f) set out the content sought to be removed with details of where the content is contained [including the unique online address or other unique identifier];</p> <p>(g) attach an affidavit or any other declaration attesting to claim of ownership, validity of the rights, good faith and setting out any efforts to have entities responsible for making the content available to remove the content;</p> <p>(h) be copied to the Board, Communication Authority and the recognised umbrella association of service providers.</p>	<p>To prevent overbroad and non-specific take down requests, and save ISPs from the risk of taking down lawful content and having to figure for themselves where the infringing content is online, takedown requests for material that is stored on a website or online server should include all web addresses and URLs that uniquely identify that material.</p>
	<p>Rephrase 35B(4) to—</p> <p>(4) An Internet Service Provider shall disable access to the material expeditiously and within <i>expeditiously with a role for the Competent Authority to adjudicate</i>, considering the circumstances of the case unless it receives a counter notice from the entity accused of infringement or any other person exercising a legal right by making available the content fulfilling the requirements set out for a take down notice and contesting the contents of the takedown notice."</p>	<p>1. Requiring take down within 48 hours is unfair and unworkable for ISPs. There's need to consider the complexity of the take-down requests: The ISP needs more time to assess whether the content is actually lawful. Some content may require language translation, some notices may be sent during non-working days. Each take-down request needs to be considered on its own unique circumstances.</p> <p>A 48 hr notice would mean ISPs may not have enough time and they will tend to remove content automatically, which will lead to a form of censorship.</p> <p>This will also hurt ISPs business, because in order to comply they will need to dedicate a lot of resources for dealing with take-down notices within a short time. The short time-line will incentivize people who may not have a proper basis to file take down requests, leading to a vicious cycle raising the compliance burden for ISPs.</p>

		<p>2. It should not be the case that only a person who has been accused of infringement can file a counter-notice. Sometimes the person filing the takedown notice could be wrong about who the uploading/infringing party is; or the uploaded content may be subject to a joint ownership; or the copyright to it may have been assigned. It may also be that the content may be in the public domain or owned by the government and therefore many parties may exercise a public-interest right to counter the takedown notice.</p> <p>Ensure due process and rational safeguards in copyright enforcement and protect from censorship through copyright balancing with access to information which is a fundamental right.</p>
24	Delete the words “or where administrative shortfalls are apparent” in proposed section 46(3A) and replace with “or where the Board in its discretion finds that the requirements of tile Act have not been fully complied with”.	The term “administrative shortfalls” is broad and not clearly defined
	Amend Section 46(11) to specify graduated sanctions and an appeal process for Collecting Society Board Members and Management under this section, sequentially "a caution, warning, penalty and finally de-registration and appeal"	There is need to have a rationalised escalation of sanctions starting with a caution, a warning, a penalty and finally deregistration with reasonable right of appeal ensuring natural justice to the Collecting Society.
	Delete Section 46B(1)	The terms and conditions for service of the CEO of the CMO should be determined by the Board of the CMO. [KECOBO should Regulate NOT 'Control' independent Collecting Societies] . This Section undermines the authority and reasoning of the Board of Directors and members of the CMO to hire and fire a CEO.
	Rephrase Section 46B(3) to— “A Director elected as a chairperson of a collective management organization shall hold office for a period of three years and shall be eligible for re-election for a further single term of three years.”	Eliminates terms of appointment double standards on Chairperson of KECOBO Board vs Chairperson of CMO. Aligned with <i>SCAC/Mwongozo guidelines</i>
	Delete Section 46B(4)	The law should be stable, predictable and reliable and applied uniformly/blindly. Coding undefined “special circumstances” creates room for legal uncertainties and unpredictability.
	Insert a section imposing CMO revenues collected transparency by obligating KECOBO to regularly publish such information obtained from CMO and how the same was disbursed to copyright holders.	Section 46D is silent on revenue transparency
	Insert new subsection, 46(D) (7)— “The Executive Director of KECOBO shall	Section 46D silent on KECOBO information on CMO revenue transparency. Duplicating revenue transparency

	regularly publish books, accounts and other financial records obtained under this Act.”	requirement on KECOBO and CMO eliminates doubt
27	Amend to expressly state the mandate of the tribunal including arbitration of disputes between rights holders.	The mandate of the Tribunal is unspecified nor are its terms of appointment and functions fully stated.
	Amend to ensure that the Tribunal is constitutionally aligned and meets the test for fairness. Adopt alternative forms of dispute resolution including reconciliation, mediation and arbitration.	Promote Alternative Dispute Resolutions include arbitration and mediation
29	Amend the proposed Second Schedule In the proposed section A(1)(a) to delete the words “the purposes of” immediately after “for” and replace with “purposes such as”	
	<p>Insert a new section immediately after A(1) which reads—</p> <p>“In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—</p> <ol style="list-style-type: none"> (1) the purpose; (2) character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (3) the nature of the copyrighted work; (4) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (5) the effect of the use upon the potential market for or value of the copyrighted work.” 	<p>In its current form, the Bill reverses jurisprudence on the five factor (of six') test for fairness provided by the Supreme Court of Kenya in the “Digital Migration” case. New legislation ought to further develop not retard legal growth.</p> <p>The 6 test are:</p> <ol style="list-style-type: none"> (i) The purpose of the dealing; (ii) The character of the dealing; (iii) The amount of the dealing; (iv) Alternatives to the dealing; (v) The nature of the work; and (vi) The effect of the dealing on the work <p>Does not provide a criterion for determining 'fairness'. It is the purpose for the dealing and not the person or institution engaged in fair dealing.</p>
ADDITIONAL PROPOSALS	Amend section 42 of the Act to deleted the words “and any officer of the Board who at the time is wearing a visible badge of office and authorized thereto in writing by the Board, may arrest, without warrant, any person who, in his presence, commits any such offence, and may detain such person until that person can be delivered into the custody of a police officer to be dealt with according to law”	KECOBO is granting unto itself the copyright security law enforcement powers while it is a Copyright Regulation Administration entity not a constitutionally mandated organ contrary to Article 239 of the Constitution on National Security Organs.
	Amend section 2 of the Act to insert the following definitions—	'Royalty' is used in over 10 provisions elsewhere in the Act yet no definition is provided in this section.
	“Royalty” means a payment to an author or owners of rights for use of their work where prior authorisation was granted.	The proposed deletion of 'Folklore' creates a vacuum with respect to KECOBO's mandate

<p>“Cultural Expression” has the meaning assigned under the Traditional Knowledge and Cultural Expressions Act, 2016.</p>	<p>under the Traditional Knowledge and Cultural Expressions Act, 2016.</p>
<p>Amend section 4 of the Act to delete the full stop and insert the following words "as the National Office with branches at county level".</p>	<p>The section suggests that KECOBO will only have one office in Nairobi. This does not conform with Chapter 2,9 and 11 of the Constitution on devolution.</p>
<p>Amend section 8 of the Act to insert immediately after s8(2), the following—</p> <p>“The conduct and regulation of the business and affairs of the Board shall be in accordance with highest standards of ethics, integrity and good conduct in line with Article 10 of the Constitution, the Mwongozo Code among other applicable good governance frameworks that may be applicable from time to time.”</p>	<p>There is no corporate governance framework for the Board.</p>
<p>Amend section 9 of the Act to insert immediately after the last sentence the following—</p> <p>“Such remuneration, fees and allowances paid to Board members by KECOBO should be made a matter of public record”</p>	<p>There is no requirement to allow public access to information on remuneration, fees and allowances paid to Board members by KECOBO.</p>
<p>Amend section 19 of the Act to insert a new subsection (4) as follows—</p> <p>“The accounts of the Board under this section shall be made available on its official website as soon as practicably possible.”</p>	<p>There is no requirement to allow public access to information on all books and records of accounts of KECOBO income, expenditure, assets and liabilities. Such books and records of accounts by KECOBO should be made a matter of public record.</p>
<p>Amend section 19 of the Act to . Replace the words “Competent Authority” with “Copyright Tribunal”.</p>	<p>The Competent Authority is proposed to be renamed as the Copyright Tribunal but this proposed change has not been reflected in this section.</p>
<p>Amend section 19 to delete the words “and such decision shall be final.”</p>	<p>Section 21(3) appears to oust the jurisdiction of the High Court and other subordinate courts.</p>
<p>Amend section 26 of the Act to insert immediately after (a), the following—</p> <p>(b) In determining whether an act done in relation to a work constitutes fair dealing or fair use, all relevant factors shall be taken into account, including but not limited to—</p> <p>(i) the nature of the work in question;</p> <p>(ii) the amount and substantiality of the part of the work affected by the act in relation to the whole of the work;</p> <p>(iii) the purpose and character of the use, including whether-</p> <p>(aa) such use serves a purpose different from that</p>	<p>To align the fair dealing provision with the decision of the Supreme Court in the Digital Migration case.</p>

of the work affected; and (bb) it is of a commercial nature or for non-profit research, library or educational purposes; and (iv) the substitution effect of the act upon the potential market for the work in question.	
Amend section 38(10) of the Act as follows— All fines imposed and recovered by a competent court in respect of the contravention of any of the provisions of this Act or of any regulations made thereunder shall be paid to the general revenues of Kenya.	Any direct financial benefit to KECOBO from fines could encourage rent-seeking and bounty hunting on the part of the Board.
Repeal and reenact the Act.	Overly voluminous Copyright (Amendment) Bill 2017 span 64 pages amending parent Act 37 of pages (double)
Prohibit and penalise payola	Illegal payola payments by content promoters to broadcasters to distort creative economy marketplace
Prohibit copyright enforcement overreach to the weakest and most disadvantaged individuals	Redress inequitable, unjust, high-handed enforcement reinforcing the one purpose of rule of law - to protect the rights of the smallest minority that has ever existed- the individual.
Compel mandatory minimum contractual conditions	Protect copyright owners from themselves. Address the imbalance of power on negotiation between individual copyright owners and established large institutional entities
Recognise copyright owners right of use over their own Works under Open Licensing Frameworks	Current Act based on wrong premise that *All Works* for sale Correct ignorance of Kenya's obligations under international Open Licensing instruments, for example, UNESCO on OER
Provide for legal restrictions on intermediary violation of users fundamental rights provided by the constitution.	Copyright law overly awarding intermediaries with unconstitutional surveillance powers, burden of duty and or penalising on failure to comply interfere with Fundamental Rights, such as, Privacy of communications,
Set the legal framework for cross-border copyright violations with due process oversight.	The Copyright (Amendment) Bill, 2017 and parent Act are weak or silent while Internet penetration continues to grow

Following the presentation the Committee further noted as follows;

1. On definition of the work folklore, the Protection of Traditional Knowledge and Cultural Expression Act does not define folk lore. Deleting the definition creates room for mischief earlier corrected by law.
2. The proposed amendments to the Copyright Act of 2001 were several hence there was need to consider repealing the current Act.

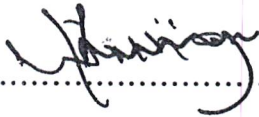
3. There is a challenge of accountability by Collective Management Organizations in collection of royalties however if the right systems are set up the CMO's would be effective.
4. There was need to reduce the current membership of the Board Members from 21 to 9 in line with the Mwongozo principles and rationalize the number of Board Directors to ensure that rights holders in all works are eligible for copyright are represented.
5. The Committee to consider coming up with a law that prohibit and penalise payola.

MINUTE NO.149/2018

ADJOURNMENT

There being no business the meeting was adjourned at 11.30am

Signed.....



.....Date.....

12/06/2018

Chairperson



MINUTES OF THE 32ND SITTING OF THE DEPARTMENTAL COMMITTEE ON COMMUNICATION, INFORMATION AND INNOVATION HELD AT AMANI CONFERENCE HALL IN BOMA HOTEL ON 21ST SATURDAY APRIL, 2018 AT 9.00AM.

PRESENT

1. Hon. William Kipkemoi, M.P. -Chairperson
2. Hon. Innocent Momanyi Obiri, M.P
3. Hon. Maritim Sylvanus, M.P
4. Hon. Gertrude Mbeyu Mwanyanje, M.P.
5. Hon. John Kiarie Waweru, M.P
6. Hon. Liza Chelule Chepkorir ,M.P
7. Hon. Mwambu Mabongah, M.P.
8. Hon. Jonah Mburu, M.P.
9. Hon. Anthony Tom Oluoch, M.P.
10. Hon. Marwa Kitayama Maisori, M.P.
11. Hon. Godfrey Osotsi Atieno, M.P

APOLOGIES

1. Hon. George Macharia Kariuki, M.P. -Vice- Chairperson
2. Hon. Annie Wanjiku Kibeh, M.P
3. Hon. Erastus Nzioka Kivasu, M.P.
4. Hon. Wamuchomba Gathoni, M.P.
5. Hon. Alfah O. Miruka, M.P.
6. Hon. Mwangaza Kawira, M.P
7. Hon. Joshua Kimilu Kivinda, M.P.
8. Hon. (Eng.). Mark Nyamita, M.P

National Assembly Secretariat

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|-----------------------|-------------------------------------|
| 1. Mr.Nicholas Emejen | Deputy Director, Committee Services |
| 1. Ms Ella Kendi | Clerk Assistant III |
| 2. Mr.Ronald Walala | Legal Counsel II |
| 3. Ms.Lorna Okatch | Research Officer |
| 4. Ms.Catherine Gati | Fiscal Analyst |
| 5. Ms.Beatrice Auma | Personal Secretary |
| 6. Ms.Sharon Aleyo | Office Attendant |
| 7. Mr.Mohamed Said | Serjeant at arms |

MINUTE NO. 122/2018: PRELIMINARIES

The meeting was called to order at twenty minutes past nine o'clock and followed with a word of prayer.

MINUTE NO. 123/ 2018: CONSIDERATION OF THE MEMORANDA ON COPYRIGHT (AMENDMENT) BILL, 2017

The Legal Counsel made the presentation on the memoranda of the Copyright (Amendment) Bill, 2017 as per the matrix;

CLAUSE	ENTITY/PERSON	PROPOSAL	RATIONALE	COMMENTS
2	SIGNS MEDIA KENYA LIMITED	Amend the proposed new definition of the term “work” by inserting the words “into sign language and other languages” immediately after the word “translations”		Invite them for a meeting
		Amend the definition of “beneficiary person” by including a new paragraph covering deaf persons.		
		Amend the definition of “public performance” in paragraph (a) by inserting the words “sign language gesturisation” immediately after the word “acting”.		
	RECORD INDUSTRY ASSOCIATION OF KENYA (RIAK)	Amend section 5 of the Act to also include licensing of copyright enforcement agents to contain marauding copyright monitors, quacks and imposters and the consumers of copyright works so as to make it easy for CMOs to contain public performance license defaulters.	This is an area that requires urgent attention as it is the most crucial amendment. Failure to comply with this section of the law should be criminalized to force observance of the same.	
	PHAT! INTELLECTUAL PROPERTY	The phrases “Technological Protection Measures” under 26B and “Computer Program” under 26A both need to be defined to give a concise and unambiguous meaning.		Agreed to
	AGA KHAN UNIVERSITY	Amend the definition of “author” by— (a) inserting the word “dramatic” immediately after the word “musical” in paragraph (a); (b) inserting the word “creation” immediately before the word “composition” in paragraph (b).	The inclusion of “dramatic work” is crucial in any Copyright Act and has been omitted in the Principal Act. This group of works covers plays, screenplays and scripts.	Invite them for a meeting
	ALBERT GACHERU KIARIE	Define the terms “communication to the public”, “Performance in	for the purposes of all stakeholders having an understanding of the kind	Invite MCSK for a meeting.

		public places” and “public performance”	of copyright they are dealing with	
	ANJARWALLA & KHANNA	We recommend the inclusion in the Bill of a definition of the term “visual artist”.	Clause 11 of the Bill proposes the creation of collective management organisations by visual artists to manage the artistic resale rights provided for under the proposed section 26D. The term “visual artists” is not defined.	Agreed to
		We recommend that the distinction between the terms visual art, artwork, artistic work and original work of art be clearly set out	These terms appear to have an overlap which creates a lack of clarity.	Define original artistic work and harmonize it all through
		Amend Clause 2 (f) (ii) of the Bill to insert the words “where such transmission constitutes an infringement of any rights protected by this Act; or”.	The clause does not capture the infringing nature of the transmission	Agreed to
	KENYA ASSOCIATION OF MUSIC PRODUCERS (KAMP)	Amend definition of “publication” to insert the words “including works made available to the public by wire or wireless means in such a way that members of the Public can access them from a place or a time individually chosen by them immediately after the words “sound recording”.	This would cover publication of works in the online environment as well.	Invite them for a meeting
	CREATIVE ECONOMY WORKING GROUP	Insert a new definition of “artist” as a person who creates artistic works.	To disambiguate: whereas “artistic work” is defined, the person who creates such “artistic work is undefined”	Invite them for a meeting
		Define “musical work” as “a work consisting of music, irrespective of musical quality, and includes any graphical notation of such work and works composed for musical accompaniment.	The proposed definition of 'musical works' does away with the words “irrespective of musical quality”. This is not advisable since these words are crucial to ensure artistic neutrality in copyright. Further, it is proposed to replace “any	

			works composed for musical accompaniment” with “graphic notations”. Graphic notations describe the representation of music through visual symbols outside the realm of traditional music notations also referred to as “diagrammatic notations”. In as much as graphic notations is a suitable amendment to this definition, it must be noted that it does not completely substitute any works composed for musical accompaniment, which is an important inclusion in this definition.	
	PHAT! INTELLECTUAL PROPERTY	The addition of Section 5 (fa) requiring the licensing of all dealers of Copyrighted works may need some reworking. It may be problematic to require such licensing, particularly in the Kenyan landscape where authors of Copyrighted works often sell their works themselves.	This provision would therefore imply the requirement that authors are licensed as well, an eventuality, which is likely not envisaged in the wording of this provision. Perhaps the most practical alternative method of implementing the sentiment in this provision would be to have a free or affordable registry of all dealers, which the Board would then only use to monitor as an anti-piracy effort	
9	MMC LAW AFRICA	Amend proposed section 22A(1) as follows— “The Board shall keep and maintain a record called the Register of copyright, wherein shall be entered all registered copyright and related works with the names, addresses and description of their proprietors, notification of assignments and	To provide clarity as to the rights that may be recorded in the register. This includes the right to absolute proprietorship, assignments, transmissions, licenses and any other limitations or conditions on relating to the registered copyright work.	Invite them for a meeting

		transmissions, the names, addresses and description of all licensees, conditions, limitations and any such other matters relating to registered copyright as may be prescribed”		
		Amend section 26(1) of the Act by deleting paragraph (b).	The paragraph is the same as (a).	
11	SIGNS MEDIA LIMITED	Insert a new paragraph in the proposed section 26C(1) immediately after paragraph (b) as follows— “(c) A person or firm to make cover versions and make accessible to the public previously published audio visuals into sign language for purposes of use by persons with hearing impairment, by notifying the board or collective management organization in charge of that class of works in writing, by listing down the works and the author(s).”		Invite them for a meeting

It was resolved to invite the Signs Media Kenya, Creative Economy Working Group, Kenya Association Music Producers, the Agakhan University, Performers Rights Society of Kenya, MMC Africa Law, Music Copyright Society of Kenya, Ms. Irene Murugi and Multi choice Kenya Ltd to consider their memoranda on Copyright (Amendment) Bill, 2017

MINUTE NO. 124/2018

ADJOURNMENT

There being no other business, the sitting adjourned at 1.30pm.

Signed..........Date 12/06/2018.....

(Chairperson)



MINUTES OF THE 31ST SITTING OF THE DEPARTMENTAL COMMITTEE ON COMMUNICATION, INFORMATION AND INNOVATION HELD AT AMANI CONFERENCE HALL IN BOMA HOTEL ON 20TH FRIDAY APRIL, 2018 AT 2.00PM.

PRESENT

1. Hon. William Kipkemoi, M.P. -Chairperson
2. Hon. Innocent Momanyi Obiri, M.P
3. Hon. Maritim Sylvanus, M.P
4. Hon. Gertrude Mbeyu Mwanyanje; M.P.
5. Hon. John Kiarie Waweru, M.P
6. Hon. Liza Chelule Chepkorir ,M.P
7. Hon. Mwambu Mabongah, M.P.
8. Hon. Marwa Kitayama Maisori, M.P.
9. Hon. Godfrey Osotsi Atieno, M.P

APOLOGIES

1. Hon. George Macharia Kariuki, M.P. -Vice- Chairperson
2. Hon. Annie Wanjiku Kibeh,M.P
3. Hon. Erastus Nzioka Kivasu, M.P.
4. Hon. Jonah Mburu, M.P.
5. Hon. Wamuchomba Gathoni, M.P.
6. Hon. Anthony Tom Oluoch, M.P.
7. Hon. Alfah O. Miruka, M.P.
8. Hon. Mwangaza Kawira, M.P
9. Hon. Joshua Kimilu Kivinda, M.P.
10. Hon. (Eng.). Mark Nyamita, M.P

National Assembly Secretariat

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|-----------------------|-------------------------------------|
| 1. Mr.Nicholas Emejen | Deputy Director, Committee Services |
| 1. Ms Ella Kendi | Clerk Assistant III |
| 2. Mr.Ronald Walala | Legal Counsel II |
| 3. Ms.Lorna Okatch | Research Officer |
| 4. Ms.Catherine Gati | Fiscal Analyst |
| 5. Ms.Beatrice Auma | Personal Secretary |
| 6. Ms.Sharon Aleyo | Office Attendant |
| 7. Mr.Mohamed Said | Serjeant at arms |

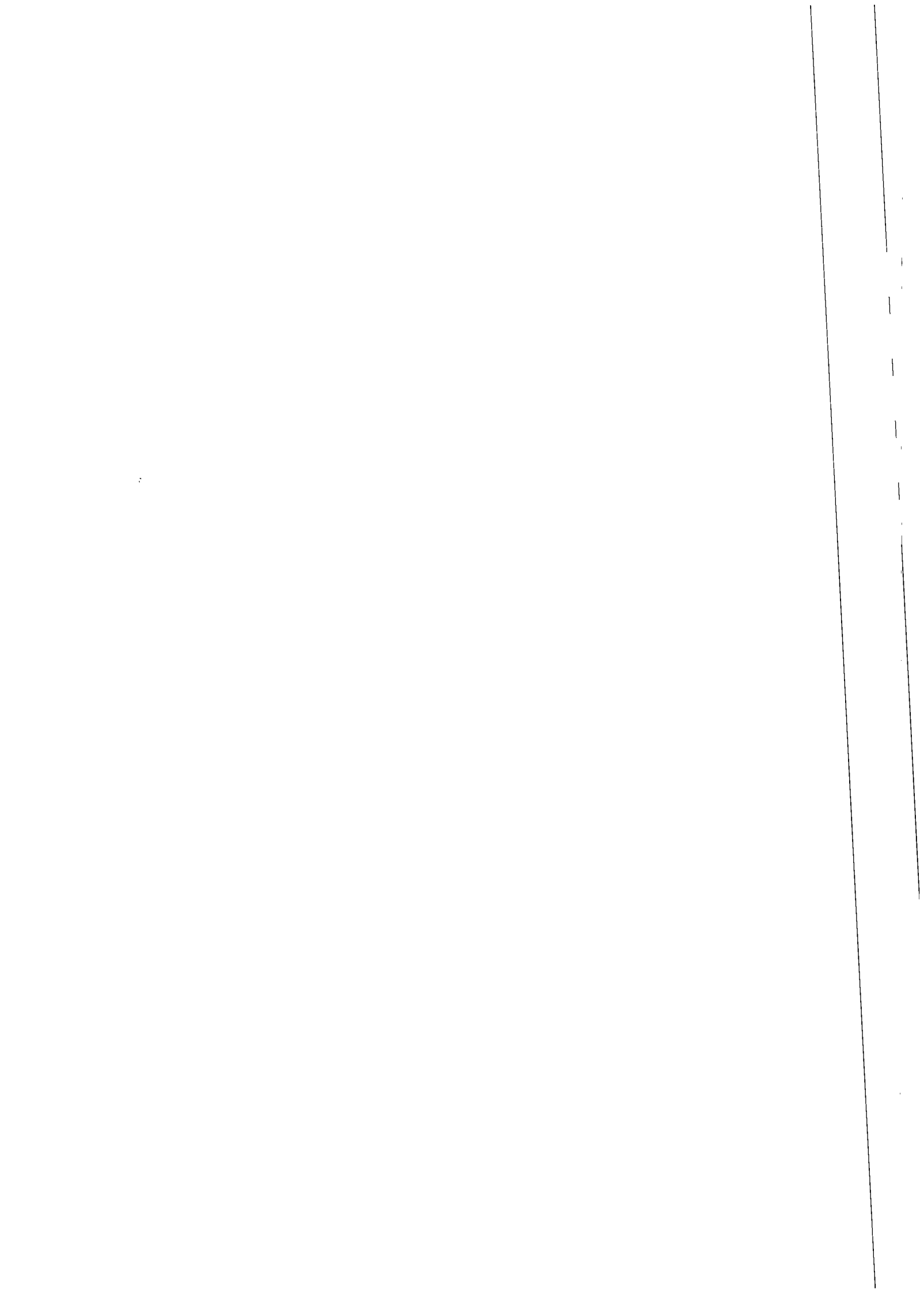
MINUTE NO. 119/2018: PRELIMINARIES

The meeting was called to order at twenty minutes past two o'clock and followed with a word of prayer.

MINUTE NO. 120/ 2018: CONSIDERATION OF THE COPYRIGHT (AMENDMENT) BILL, 2017

Clause 26 sought to amend Section 47 of the Act to change the terminology used from “collecting society” to “collective management organization”. It was agreed to

Clause 27 sought to amend section 48 of the Act to change the terminology used from “collecting society” to “collective management organization” and to replace the “competent authority” with the Copyright Tribunal as the dispute resolution body under the Act.



- (a) Section 48(1) of the Act should be further amended to delete the word “authority” at the end of the subsection and replace it with the word “Tribunal”;
- (b) Section 48(2)(e) both as it reads currently and as amended is incomprehensible. There is need to amend it for clarity;

Clause 28 sought to amend section 49 of the Act to empower the Attorney General to make regulations. It was agreed to

It was pointed out that the amendment sought to empower the Attorney General to make regulations yet section 2 of the Act does not define the Attorney General as the Cabinet Secretary responsible for the Act.

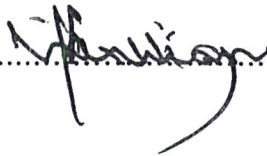
Clause 29 sought to insert a new Schedule into the Act to outline the extent of fair dealing with regard to copyrighted work.

MINUTE NO. 121/2018

ADJOURNMENT

There being no other business, the sitting adjourned at 4.20pm

Signed.....



.....Date

12/06/2018

(Chairperson)



MINUTES OF THE 30TH SITTING OF THE DEPARTMENTAL COMMITTEE ON COMMUNICATION, INFORMATION AND INNOVATION HELD ON FRIDAY 20TH APRIL 2018, AT 9.00 A.M. AT AMANI MEETING ROOM, BOMA HOTEL, NAIROBI

PRESENT

1. Hon. Kisang' William Kipkemoi, M.P. - **Chairperson**
2. Hon. Marwa Kitayama Maisori, M.P.
3. Hon. Mwangi Mabongah, M.P.
4. Hon. Maritim Sylvanus, M.P.
5. Hon. Gertrude Mbeyu Mwanyanje, M.P.
6. Hon. Godfrey Osotsi Atieno, M.P
7. Hon. Innocent Momanyi Obiri, M.P
8. Hon. John Kiarie Waweru, M.P
9. Hon. Anthony Tom Oluoch, M.P.
10. Hon. Jonah Mburu, M.P.

APOLOGIES

1. Hon. George Macharia Kariuki, M.P. - **Vice- Chairperson**
2. Hon. Liza Chelule Chepkorir ,M.P
3. Hon. Annie Wanjiku Kibeh,M.P
4. Hon. Joshua Kimilu Kivinda, M.P.
5. Hon. Mwangaza Kawira, M.P
6. Hon. Wamuchomba Gathoni, M.P.
7. Hon. Alfah O. Miruka, M.P.
8. Hon. Erastus Nzioka Kivasu, M.P.
9. Hon. (Eng.). Mark Nyamita, M.P

IN ATTENDANCE

National Assembly Secretariat

1. Mr. Nicholas Emejen - Deputy Director, Committee Services
2. Ms. Ella Kendi - Clerk Assistant
3. Mr. Ronald Walala - Legal Counsel
4. Ms. Lorna Okatch - Research Officer
5. Ms. Catherine Gati - Fiscal Analyst
6. Ms. Betty Auma - Secretary, Committee services
7. Ms. Rahab Chepkilim - Audio Recorder
8. Mr. Mohamed Said - Sergeant- at- arms
9. Ms. Sharon Aleyo - Office assistant

MINUTE NO. 114/2018:

PRELIMINARIES

The Chairperson called the meeting to order at twenty minutes past nine followed with a word of prayer.

MINUTE NO.115/2018:

CONFIRMATION OF MINUTES

The confirmation of the minutes of the previous sitting was deferred to the next meeting.

MINUTE NO.116/2018: CONSIDERATION OF THE SUPPLEMENTARY ESTIMATES II FOR THE FINANCIAL YEAR 2017/18

The Fiscal analyst informed the Committee as follows;

1. Article 223 of the Constitution provides for the National Government to incur expenditure not appropriated for in the annual Appropriation Act on account of: insufficiency of amounts initially provided; when a need has arisen for expenditure to which no amounts have been allocated; or for withdrawals from the Contingencies Fund. In that regard, approvals for such expenditures must therefore be sought from Parliament through a Supplementary Budget and subsequently a Supplementary Appropriation Bill. However, the amount spent should not be more than **10 percent** of total sum appropriated by Parliament unless in special circumstance Parliament has approved a higher percentage.
2. An analysis of the absorption rates of the absorption rates shows that the state department of ICT and Innovation and State Department of Broadcasting & Telecommunications recorded fairly average absorption rates of 69% and 56% respectively. That meant that the departments were not likely able to absorb the proposed estimates during the remaining period.
3. The total allocation to the State Department of ICT and Innovation under the supplementary estimates II was **Kshs 13,083.6 million**. This is comprised of **Kshs 1,118.6 million** for recurrent and **Kshs 11,965.0 million** for Development estimates.
4. The allocation has decreased by Kshs 1,349.2 million and this is attributed to decreased donor commitments and budget rationalization.
5. The total allocation to the State Department of Broadcasting and Telecommunication under the supplementary estimates II was **Kshs 3,743.9 million**. This is comprised of **Kshs 3,363.4million** for recurrent and **Kshs 380.5 million** for Development estimates.
6. The total allocation has increased by a total of **Kshs 1,595.7 million**. The increase in recurrent expenditure is attributed to the adjusted in AiA under the Government Advertising Agency, personnel emolument and operations and maintenance expenditures while capital expenditure is on account of increased grant to KBC to strengthen its operation under the Digital migration programme.

Following the presentations the following observations were made;

1. That the ICT was an enabler of the Big four plans and there was need for it to be funded sufficiently.
2. The two State Departments had recorded very low absorption rate an indication that it was not possible to utilize all the funds allocated to them during the current financial year.
3. The reduction in the development expenditure of the two State Departments was likely to occasion pending bills and stalled projects as some projects had already commenced.

4. The reductions for some programmes under the State Department for Broadcasting and Telecommunication had exceeded the 10%. This was in contravention of the threshold as outlined/provided by the Section 43(2) of the Public finance management Act.
5. There is a mismatch between the revised allocations to the MDAs and the corresponding revised outputs as for every increment in allocation there should be an increment in outputs and vice versa.

MINUTE NO.117/2018: CONSIDERATION OF THE COPYRIGHT (AMENDMENT) BILL, 2017

The Legal Counsel briefed the Committee as follows;

Clause 21 sought to amend section 38 of the Bill to enhance penalties for copyright infringement. For offences relating to infringing copies, the penalty is sought to be enhanced from a fine of four hundred thousand or imprisonment for a term not exceeding ten years to a fine of five times the market value of the work or one thousand shillings for each infringing copy, whichever is higher. For offences relating to broadcasts, the amendments seek to enhance the penalty from a fine of one hundred thousand shillings or imprisonment for a term not exceeding two years to a fine of one million shillings or imprisonment for a term not exceeding five years, or both.

The Committee made the following proposals on the Clause;

1. To define the term “diffusion service” sub section (1) g for clarity
2. Delete sub section 6(a) in the Act to avoid double jeopardy
3. Under subsection 6(b) enhance the penalties to imprisonment term of twenty years.
4. There was need to provide penalties for repeated offences under the Clause.

Clause 22 sought to insert a new section 38A into the Act to define the extent of corporate liability for acts done in contravention of the Act. Under the new section, directors and employees of a company and equally liable for any acts of infringement. The amendment was agreed to.

Clause 23 sought to amend section 43 of the Act to assign prosecuting authority to the Director of Public Prosecutions instead of the Attorney-General. The amendment was agreed to

Clause 24 sought to amend section 46 of the Act to change the terminology used from “collecting society” to “collective management organization”. The amendment also seeks to delete spent transitional provisions. It further requires the Kenya Copyright Board to observe due process before deregistering a CMO and criminalizes the act of collecting royalties without the approval of the Board. Collection without approval attracts a fine not exceeding five hundred thousand shillings or imprisonment for a term not exceeding four years, or both.

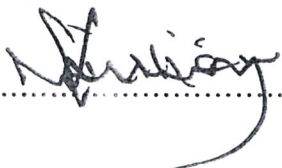
Subclause (3) was amended to delete the words “shorter term” and substituting therefor the words “six months” citing that there was need to define the specific period.

Clause 25 sought to insert new sections 46B, 46C, 46D, 46E, 46F and 46G into the Act.

1. The proposed new sections provide for the establishment, management and supervision of Collective Management Organisations (CMOs). To be elected a CMO director, one needs at least a one-month post-secondary qualification. Once elected, a director may only serve for two three-year terms. A person elected chairperson of a CMO may only serve a single three-year term while the Chief Executive Officer of a CMO can only serve a single four-year term save where the CMO is newly established in which case the person may serve a further term with the approval of the Board.
2. Under the proposed new sections, the Executive Director of the Kenya Copyright Board may inspect CMOs and recommend remedial action or a forensic audit where appropriate. Where an audit or inspection report reveals act contravening the Act, the Board may, among others, recommend the suspension or removal from office of an official or employee of a CMO, issue remedial directions, require the CMO to reconstitute its governing body, place the CMO under statutory management or revoke the CMO’s license.
3. It was proposed that the text of the proposed new sections 46B, 46C, 46D, 46E, 46F should be revised for clarity and consistency in language and usage of terms;

MINUTE NO.118/2018: ADJOURNMENT

There being no other business, the sitting adjourned at 1.30 pm. Next sitting of the Committee to be held at 2.30 pm at the same venue.

Signed..........Date.....12/06/2018.....

(Chairperson)

MINUTES OF THE 29TH SITTING OF THE DEPARTMENTAL COMMITTEE ON COMMUNICATION, INFORMATION AND INNOVATION HELD IN 4TH FLOOR PROTECTION HOUSE, PARLIAMENT BUILDINGS ON THURSDAY 19TH APRIL 2018 AT 11.30 A.M.

PRESENT

1. Hon. William Kipkemoi, M.P. -Chairperson
2. Hon. Erastus Nzioka Kivasu, M.P.
3. Hon. Innocent Momanyi Obiri, M.P
4. Hon. Anthony Tom Oluoch, M.P.
5. Hon. Alfah O. Miruka, M.P.
6. Hon. Mwangaza Kawira, M.P
7. Hon. Maritim Sylvanus, M.P
8. Hon. Jonah Mburu, M.P.
9. Hon. Wamuchomba Gathoni, M.P.
10. Hon. Gertrude Mbeyu Mwanyanje, M.P.
11. Hon. John Kiarie Waweru, M.P
12. Hon. Liza Chelule Chepkorir ,M.P
13. Hon. Mwambu Mabongah, M.P.
14. Hon. Marwa Kitayama Maisori, M.P.
15. Hon. Godfrey Osotsi Atieno, M.P

APOLOGIES

1. Hon. George Macharia Kariuki, M.P. -Vice- Chairperson
2. Hon. Annie Wanjiku Kibeh, M.P
3. Hon. Joshua Kimilu Kivinda, M.P.
4. Hon. (Eng.). Mark Nyamita, M.P

National Assembly Secretariat

- | | |
|------------------------|---------------------|
| 1. Mr.Nicholas Emejien | Deputy Director |
| 1. Ms Ella Kendi | Clerk Assistant III |
| 2. Mr.Ronald Walala | Legal Counsel II |

MINUTE NO.110/2018: PRELIMINARIES

The meeting was called to order at thirty minutes past eleven o'clock followed with a word of prayer.

MINUTE NO.111/ 2018: CONSIDERATION OF THE COPYRIGHT (AMENDMENT) BILL, 2017

1. **Clause 16** sought to amend section 33 of the Principal Act on assignment and licenses. The amendment was agreed to

2. **Clause 17** of the Bill seeks to amend section 33A of the Act to replace the “competent authority” with the Board as the body empowered to grant a license for works not made available in the Kenyan market.

The amendment was agreed to

3. **Clause 18** seeks to amend section 35 of the Act to protect the rights of a producer of a sound recording.

It was indicated that the proposed amendment to section 35 should be revised as it deletes a significant portion of subsection (1) which renders the section as amended incomprehensible;

4. **Clause 19** of the Bill sought to insert new sections 35A, 35B and 35C in the Act. These outline provisions on protection of Internet Service Providers (ISPs) from liability for infringing material displayed by their subscribers. The new sections further provide for the rights and obligations of copyright holders with regard to takedown procedures of infringing material by ISPs and the obligation of ISPs to provide information to investigative agencies on the identity of subscribers suspected of copyright infringement.

I. It was noted that the text of the proposed new section 35A, 35B and 35C should be revised as it contains several typographical, cross-referencing and drafting errors;

II. It was pointed out there was need to revise the definition of the word “ Internet Service Providers” to include content producers and broadcasters as internet service providers

5. **Clause 20** sought to amend section 36 of the Act to empower the Court to order the destruction on infringing material upon conviction of an accused person. The amendment was agreed to

MINUTE NO 112/2018 **ANY OTHER BUSINESS**

1. Computers and Cyber Crime Bill, 2017:

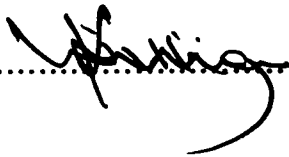
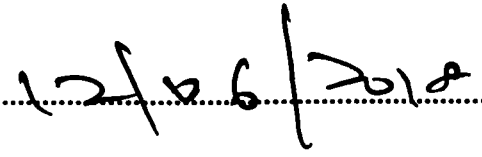
a) The Committee was informed that the Bill was scheduled for the Committee of the whole House on the week commencing on Monday 23rd April, 2018.

b) Legal Counsel was requested to follow up on amendments by Hon.Musimba for the Committee to consider them during the next meeting.

2. Retreat to Naivasha: It was resolved to hold the retreat within Nairobi County due to unavailability of accommodation in Naivasha.

MINUTE NO 113/2018 **ADJOURNMENT**

There being no other business, the sitting adjourned at 1.10pm.

Signed..........Date.....

(Chairperson)

MINUTES OF THE 28TH SITTING OF THE DEPARTMENTAL COMMITTEE ON COMMUNICATION, INFORMATION AND INNOVATION HELD IN 4TH FLOOR PROTECTION HOUSE, PARLIAMENT BUILDINGS ON TUESDAY 17TH APRIL 2018 AT 11.30 A.M.

PRESENT

1. Hon. Anthony Tom Oluoch, M.P. **Chairing**
2. Hon. Alfah O. Miruka, M.P.
3. Hon. John Kiarie Waweru, M.P
4. Hon. Liza Chelule Chepkorir ,M.P
5. Hon. Mwambu Mabongah, M.P.
6. Hon. Marwa Kitayama Maisori, M.P.
7. Hon. Godfrey Osotsi Atieno, M.P

APOLOGIES

1. Hon. William Kipkemoi, M.P. **-Chairperson**
2. Hon. George Macharia Kariuki, M.P. **-Vice- Chairperson**
3. Hon. Gertrude Mbeyu Mwanyanje, M.P.
4. Hon. Annie Wanjiku Kibeh,M.P
5. Hon. Joshua Kimilu Kivinda, M.P.
6. Hon. Erastus Nzioka Kivasu, M.P.
7. Hon. Innocent Momanyi Obiri, M.P
8. Hon. Mwangaza Kawira, M.P
9. Hon. Maritim Sylvanus, M.P
10. Hon. Jonah Mburu, M.P.
11. Hon. Wamuchomba Gathoni, M.P.
12. Hon. (Eng.). Mark Nyamita, M.P

National Assembly Secretariat

1. Mr.Nicholas Emejen Deputy Director
1. Ms Ella Kendi Clerk Assistant III
2. Mr.Ronald Walala Legal Counsel II

MINUTE NO.107/2018: PRELIMINARIES

The meeting was called to order at thirty minutes past eleven o'clock followed with a word of prayer. Pursuant to Standing Order No.188, the Members elected Hon.Anthony Aluoch,MP to chair the meeting.

MINUTE NO.108/ 2018: CONSIDERATION OF THE COPYRIGHT (AMENDMENT) BILL, 2017

Clause 10: Sought to repeal and replace section 26 of the Act to clarify the extent of copyright in literary, musical or artistic and audio-visual works and the limits to fair dealing in such works by persons other than the copyright holder.

Clause 11 sought to insert new sections 26A, 26B, 26C and 26d in the Act. The new section 26A seeks to clarify the extent of copyright with regard to computer programs and the limits to fair dealing in such works by persons other than the copyright holder.

The new section 26C seeks to exempt copyright material adapted for use by visually impaired person from being deemed as infringing material.

The proposed new section 26D seeks to protect “artist resale rights” with regard to the resale of copyrighted work. A royalty from the resale of the work is set at five percent (5%) of the net sale price for every item sold for Kshs. 20,000/- and above. Under the proposed new section, resale of buildings, drawing plans, models, identical copies of artwork or manuscripts and items resold at a charity auction are exempted from tax.

The Members proposed;

- (a) The text of the proposed new section 26C(1) (b) be revised for clarity as it is currently incomprehensible;
- (b) The proposed new section 26D(1) be amended to insert the word “of” immediately after the word “work”;
- (c) The proposed new section 26D (4) be amended to delete the word “sale” which has been repeated.

Clause 12 sought to amend section 28 of the Act to change the point at which the royalty levied on audio recording equipment and other material used for copying copyrighted works is payable from the first point of sale to the first point of manufacture or entry of the equipment or material.

The Committee pointed out that the proposed amendment should include a deletion of the phrase “subject to subsections (4) and (5)” as the amendment proposes the deletion of the two sections;

Clause 13 sought to repeal and replace section 29 of the Act for purposes of clarity. It was agreed to

Clause 14 sought to amend section 30 of the Act to change the point at which the royalty levied on audio recording equipment and other material used for copying copyrighted works is payable from the first point of sale to the first point of manufacture or entry of the equipment or material.

Clause 15 sought to insert a new section 30B into the Act to allow the Kenya Revenue Authority or other body designated by the Kenya Copyright Board to collect royalties on sound recordings on behalf of Collective Management Organizations (CMOs). Under the new section, CMOs for performers and producers and representatives of manufactures and importers of audio equipment are to agree on the rate of royalties applicable. In default of agreement by the parties, the Board is to set the rate. Additionally, the share of the collected royalties to be distributed to rights holders is to be determined by the Board.

The Committee pointed out that the proposed new section 30B should be amended in subsection (1) to insert the word “royalties” for clarity;

It was resolved to invite Kenya Copyright Board to get clarification on the Section 30B

MINUTE NO 109/2018

ADJOURNMENT

There being no other business, the sitting adjourned at 1.20pm.

Signed.....*[Signature]*.....Date.....*12/06/2018*.....
(Chairperson)



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MINUTES OF THE 27TH SITTING OF THE DEPARTMENTAL COMMITTEE ON COMMUNICATION, INFORMATION AND INNOVATION HELD IN 11TH FLOOR PROTECTION HOUSE, PARLIAMENT BUILDINGS ON THURSDAY 12TH APRIL 2018 AT 11.00 A.M.

PRESENT

1. Hon. Anthony Tom Oluoch, M.P. **Chairing**
2. Hon. Liza Chelule Chepkorir, M.P.
3. Hon. Annie Wanjiku Kibeh, M.P.
4. Hon. Joshua Kimilu Kivinda, M.P.
5. Hon. Erastus Nzioka Kivasu, M.P.
6. Hon. Mwambu Mabongah, M.P.
7. Hon. Marwa Kitayama Maisori, M.P.
8. Hon. Alfah O. Miruka, M.P.
9. Hon. Godfrey Osotsi Atieno, M.P.
10. Hon. Innocent Momanyi Obiri, M.P.

APOLOGIES

1. Hon. William Kipkemoi, M.P. **-Chairperson**
2. Hon. George Macharia Kariuki, M.P. **-Vice- Chairperson**
3. Hon. Gertrude Mbeyu Mwanyanje, M.P.
4. Hon. John Kiarie Waweru, M.P.
5. Hon. Mwangaza Kawira, M.P.
6. Hon. Maritim Sylvanus, M.P.
7. Hon. Jonah Mburu, M.P.
8. Hon. Wamuchomba Gathoni, M.P.
9. Hon. (Eng.). Mark Nyamita, M.P.

National Assembly Secretariat

1. Ms Ella Kendi Clerk Assistant III
2. Mr. Ronald Walala Legal Counsel II
3. Mr. Albert Atunga Sergeant at arms.

MINUTE NO.100/2018: PRELIMINARIES

The meeting was called to order at twenty minutes past eleven o'clock followed with a word of prayer. Pursuant to Standing Order No.188 the Members elected Hon. Anthony Aluoch, MP to chair the session.

MINUTE NO.101/ 2018: CONSIDERATION OF THE COPYRIGHT (AMENDMENT) BILL, 2017

The Committee Members were taken through the Bill and were informed that:-

1. The Bill sought to amend the Copyright Act, 2001 to domesticate provisions of the Marrakesh Treaty to facilitate access to published works for persons who are blind, visually impaired or otherwise print disabled which came into force on 30th September, 2016.
2. It further sought to expand definitions under the Act, to restate provisions in the Act for better clarity, enhance penalties for willful infringement of copyright and to establish a copyright tribunal in place of the current 'competent authority'.

Analysis of the Bill

Clause 2 of the Bill seeks to amend section 2 of the Act to-

1. Change the definition of “author” in relation to an audio visual work by deleting the word ‘film’ and substituting therefor the word ‘work’.
2. Change the definition of ‘author’ in relation to a computer program by deleting the word ‘working’ and substituting therefor the word ‘making’.
3. Change the definition of the word of broadcast by deleting word ‘broadcast’ and substituting therefor the word “broadcasting”
4. In the definition of the word ‘copy insert the word ‘audio’ immediately before the words’ or visual’
5. Broaden the definition of ‘infringing copy’ to include the making of copies using any means;
6. Broaden the definition of ‘musical work’ to include sheet music;
7. Introduce new definitions to, among others, cover formats of work accessible to visually impaired persons and define entities authorized to provide access to reading materials and information to visually impaired persons.
8. Deleting the definition of the word folklore. The Committee agreed with the amendment citing that folklore was adequately provided for in the Protection of traditional knowledge and cultural expression Act.

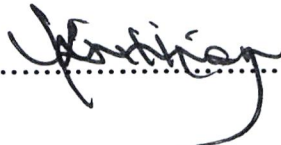
MINUTE NO 102/2018

ANY OTHER BUSINESS

It was resolved to hold a retreat in Naivasha to consider the memoranda and finalize the report on the Copyright (Amendment) Bill, 2017.

MINUTE NO.103/2018: ADJOURNMENT

There being no other business, the sitting adjourned at 1.10pm

Signed..........Date 12/06/2018.....
(Chairperson)

MINUTES OF THE 26TH SITTING OF THE DEPARTMENTAL COMMITTEE ON COMMUNICATION, INFORMATION AND INNOVATION HELD IN 2ND FLOOR PROTECTION HOUSE, PARLIAMENT BUILDINGS ON WEDNESDAY 4TH APRIL, 2018, AT 2.30 P.M

PRESENT

1. Hon. William Kipkemoi, M.P. -Chairperson
2. Hon. George Macharia Kariuki, M.P. -Vice- Chairperson
3. Hon. Gertrude Mbeyu Mwanyanje, M.P.
4. Hon. Anthony Tom Oluoch, M.P.
5. Hon. John Kiarie Waweru, M.P
6. Hon. Jonah Mburu, M.P.
7. Hon. Godfrey Osotsi Atieno, M.P

APOLOGIES

1. Hon. Alfah O. Miruka, M.P.
2. Hon. Mwambu Mabongah, M.P.
3. Hon. Innocent Momanyi Obiri, M.P
4. Hon. Mwangaza Kawira, M.P
5. Hon. Wamuchomba Gathoni, M.P.
6. Hon. Annie Wanjiku Kibeh, M.P
7. Hon. Joshua Kimilu Kivinda, M.P.
8. Hon. Marwa Kitayama Maisori, M.P.
9. Hon. Erastus Nzioka Kivasu, M.P.
10. Hon. Maritim Sylvanus, M.P.
11. Hon. (Eng.). Mark Nyamita, M.P
12. Hon. Liza Chelule Chepkorir, M.P

National Assembly Secretariat

1. Ms Ella Kendi Clerk Assistant III
2. Mr. Ronald Walala Legal Counsel II
3. Ms. Lorna Okatch Research Officer

MINUTE NO.096/2018: PRELIMINARIES

The Chairperson called the meeting to order at thirty minutes past two o'clock followed with a word of prayer.

MINUTE NO.097/ 2018: CONSIDERATION OF THE COPYRIGHT (AMENDMENT) BILL, 2017

The Chairperson informed the Committee that;

1. The Copyright (Amendment) Bill, 2017 was read a first time on Thursday 28th September, 2017 and was committed to the Departmental Committee on Communication, Information and Innovation pursuant to the provisions of the Standing Order 127(1).
2. The Bill had undergone the second reading before the Committees were constituted and therefore the Second Reading was concluded without the Committee report.
3. The Bill was scheduled for Committee of the Whole House after the current short recess.



The Members resolved to go through the Bill and the two briefs prepared by the Legal and research departments before commencing the discussions for proper understanding.

The Committee resolved to seek a further extension of twenty one days to consider the several memoranda submitted on the Bill and table its report after the long recess scheduled on May, 2018

MINUTE NO 098/2018

ANY OTHER BUSINESS

1. **Computer and Cyber Crimes Bill, 2017:** The Chairperson informed the Committee that in consultation with the Speaker, they had resolved to schedule the Bill for the third reading on 17th April, 2018.
The Committee adopted the amendments to the Bill by Hon.Osotsi and the Legal Counsel was requested to finalize the same for Chairperson to sign. The Chair urged the Members to avail themselves during the Committee stage and prepare adequately to able to justify the Committee's amendments.
2. **Retreat with TESPOK:** The Committee resolved to hold the retreat on 27th and 28th of April, 2018
3. **Pending business before the Committee:** The Committee resolved to hold a retreat to consider the pending petition and the bill during the long recess period on May 2018.
4. **Retreat with Office of the Deputy President:** The Committee was informed that the retreat organized by the in partnership with the Creative Economy Working Group scheduled on 26th and 27th of April, 2017 had been postponed to a date which would be communicated in due course.
5. **Benchmark on the Copyright (Amendment) Bill, 2017:** The Members emphasized that there was need for the Committee to benchmark to countries with the Copyright law to learn the best practices and to enhance the current law in Kenya.

MINUTE NO.099/2018: ADJOURNMENT

There being no other business, the sitting adjourned at 4.00pm.

Signed.....

(Chairperson)

Date.....12/06/2018



① J/Cutter 14/2/18

② Emerson
pls deal
FA
15/2/18

MEMORANDUM:

(k) by deleting the definition of "work" and substituting therefor the following new definition—

"work" means literary, musical, artistic work, audio visual work and sound recordings and includes translations into **Sign Language** and other languages, adaptations, new versions, or arrangements of pre-existing works, and anthologies or collections of works which, by reason of the selection and arrangement of their content, present an original character:

Recommendation.

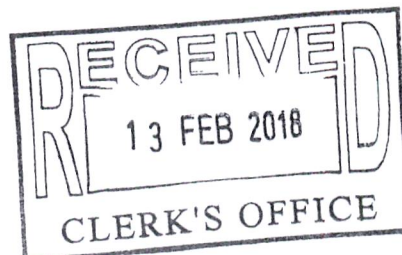
Insert the Words Sign Language immediately beforeand other languages.

(l) by inserting the following new definitions in their proper alphabetical sequence— "accessible format copy" means a copy of a work in an alternative manner or form which gives a beneficiary person access to the work, including permitting the person to have access as feasibly and comfortably as a person without visual impairment or other print disability;

"art market professional" includes an auctioneer, owner or operator of a gallery, museum, an art dealer or any other person involved in the business of dealing in artworks; "artwork" means an original work of visual art created by an artist or artists, or produced under their authority; "authorized entity" means an entity that is authorized or recognized by the government to provide education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit basis and includes a government institution or nonprofit organization that provides the same services to beneficiary persons as one of its primary activities or institutional obligations;

"beneficiary person" means a person who—

(a) is blind;



(b) has a visual impairment or a perceptual or reading disability which cannot be improved to give visual function substantially equivalent to that of a person who has no such impairment or disability and so is unable to read printed works to substantially the same degree as a person without an impairment or disability; or

(c) is otherwise unable, through physical disability, to hold or manipulate a book or to focus or move the eyes to the extent that would be normally acceptable for reading, regardless of any other disabilities;

(d) **is Deaf.**

Recommendation

(d) is Deaf.....in the definition of beneficiary.

“public performance” means—

(a) in the case of work other than an audio-visual work, the recitation, playing, dancing, acting, **Sign Language gesturisation**, or otherwise performing the work, either directly or by means of any device or process;

Recommendation

In the definition of public performance; insert----- Sign Language gesturisation ----- immediately after acting.

26C. (1) Notwithstanding the provisions of section 26, it shall not be an infringement of copyright for—

(a) an authorized entity to reproduce or to distribute copies or sound recordings of a previously published, literary work if such copies or sound recordings are reproduced or distributed in specialized formats exclusively for use by visually impaired or other persons with disabilities; or

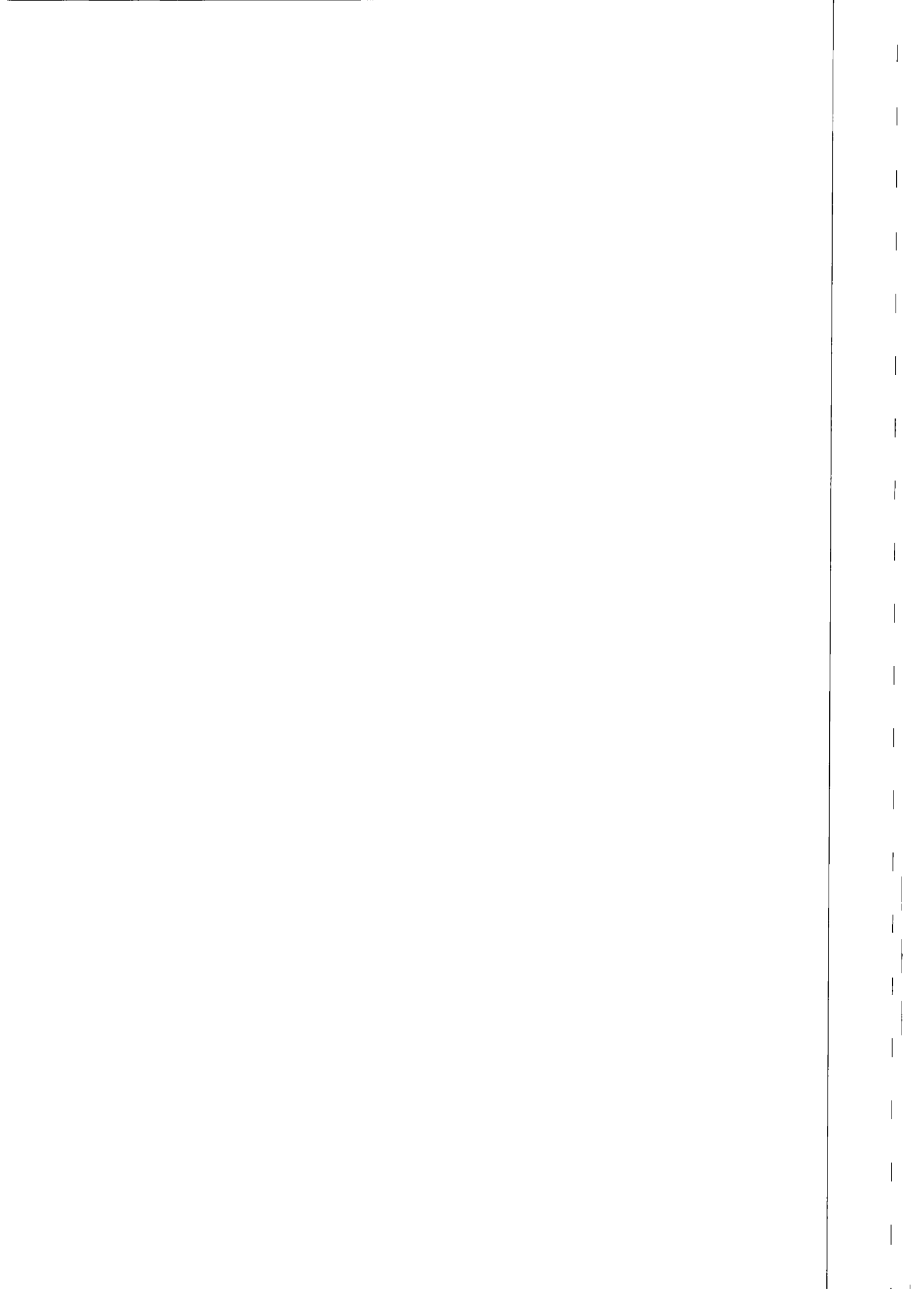
(b) to make, import, distribute, end or share accessible format copies by a beneficiary person or authorized entities or persons acting on behalf of a beneficiary person, including the circumventing any technical.

(c) A person or firm to make cover versions and make accessible to the public previously published audio visuals into Sign Language for purposes of use by persons with hearing impairment, by notifying the board or collective management organization in charge of that class of works in writing, and by listing down the works and the author(s)

Recommendation

INCLUDE in 26C. (1)

(c) A person or firm to make cover versions and make accessible to the public previously published audio visuals into Sign Language for purposes of use by persons with hearing impairment, by notifying the board or collective management organization in charge of that class of works in writing, by listing down the works and the author(s).



② AMENDMENT
pls deal
FA 14/2/18

① D/Cutter 41

2/12/18

COPYRIGHT AMENDMENT BILL 2017

RECOMMENDATIONS/PROPOSALS BY RECORDING INDUSTRY ASSOCIATION OF KENYA (RIAK)

The referenced Amendment Bill has mainly addressed issues related to Internet Service Providers (ISPs), Resale Right, Rights associated with works by Visually Impaired Persons, Collective Management Organizations (CMOs), alignment with Constitution of Kenya 2010 and some ancillary changes in penalties and definitions of some terms. Generally, most of the proposed changes in copyright legislation are necessary and most welcome.

However, the Bill has fallen short of creating an enabling environment for the creators and rights holders in copyright industry. The Bill should have addressed the most urgent and troubling issues that affect the copyright stakeholders particularly in music and film industries which is our forte.

Among the areas that the Bill ought to have tackled are as follows:

1. LICENSING OF DEALERS OF COPYRIGHT WORKS:

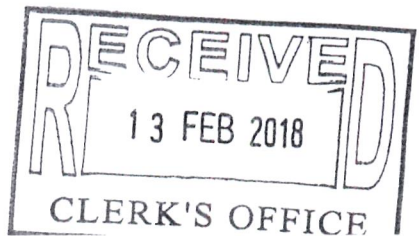
Licensing of copyright dealers as envisaged in Clause (b) (fa) can be instrumental in self-regulation of most of the stakeholders represented by various organizations such Recording Industry Association of Kenya (RIAK) and Entertainment Dealers Association of Kenya (EDAK). The import of self-regulation is to enhance compliance with the copyright law with minimal enforcement whose consequential benefits will be increased collection of royalties, instilling sanity in the industry and reduction of piracy. This section ought to have been expounded to also include licensing of copyright enforcement agents to contain marauding copyright monitors, quacks and imposters and the consumers of copyright works so as to make it easy for CMOs to contain public performance license defaulters. This is an area that requires urgent attention as it is the most crucial amendment. Failure to comply with this section of the law should be criminalized to force observance of the same.

2. OFFLINE DIGITAL DISTRIBUTION OF COPYRIGHT WORKS:

This Bill has not tackled spiraling digital piracy which is the most nagging problem facing the copyright owners today. There are hundreds of thousands of unscrupulous traders who thrive on illegal copying and sale of copyright works on digital media such as memory cards, memory chips, flash disks and hard drives and who escape the long arm of the law because the law as it is, is hinged on hard copies. It is imperative to mention that most of the artists and producers have closed shop because they cannot sell their CDs and DVDs. The Bill ought to have tackled this menace by creating another section under the offences that specifically criminalize this illegal action.

3. COLLECTIVE MANAGEMENT ORGANISATIONS:

As much as our organization is not a CMO, we strongly feel that the role of a regulator, in this particular case Kenya Copyright Board (KECOBO), should only be restricted to licensing and supervising CMOs and not to micro-managing them. The proposed amendments touching on the workings of CMOs are



tantamount to direct interference with their internal operations. The law should have been amended to create an independent body in music industry that only collects royalties and disburse the same to the relevant CMOs on guidance and direction by the regulator for distribution to the intended beneficiaries. Interfering with internal operations of CMOs will only attract endless litigations that will hinder collection of royalties at the expense of the intended beneficiaries. It is instructive to mention that the problems afflicting CMOs have more to do with the control of resources (monies) and the sleaze associated with it.

Alternatively, instead of creating so many and confusing regulations on CMOs, the regulator should just take up the responsibility of collection of royalties for onward transmission to CMOs.

4. BEING IN POSSESSION OF MASTER COPIES SHOULD BE CRIMINALISED:

Copyright criminals are always adept at bending the law to suit their illegal activities. Most of them would rather keep single copies of copyright works of different copyright owners and use them to surreptitiously make thousands of other similar copies and hide under the obnoxious Section 38(3) of the current Act. That clause ought to have been removed or possession of master copies of copyright works be criminalized.

5. DEFINITION OF AN INFRINGING COPY:

The definition of an infringing copy should be enhanced to include digital files. A copyright work in a digital media such as a memory chip should be regarded as an independent copy under the law and NOT the medium which carries those works.

6. DEFINITION OF CONTRIVANCES:

Contrivances as framed in Section 38(1)(f) of the current Act should be clearly defined in the proposed amendments for clarity purpose.

Prepared by Gikonyo Muya

For: Recording Industry Association of Kenya

Email: gikonyomuya@gmail.com

Twitter: [@gikonyomuya](https://twitter.com/gikonyomuya)

PHAT!
INTELLECTUAL PROPERTY
Equitably Monetise African Creative Today - #EMACT
 PHAT! Music & Entertainment Limited
 P.O. Box 14454-00800, Nairobi, KENYA
 E-mail: ip@phatafrica.com • Tel: +254 20 238 6060

①
 D/Amendments
 14/2/18

Mr. Michael R. Sialai, EBS,
 Clerk of the Kenya National Assembly,
 Parliament Buildings,
 P.O Box 41842 - 00100,
 Nairobi, Kenya.

②
 E-MESEN
 pls deal
 FA
 14/2/18

Monday, 12 February 2018.

Dear Sir,

RE: PHAT! Intellectual Property - Notes on the Copyright Amendment Bill 2017

Pursuant to Article 118 (1)(b) of the Constitution of Kenya that calls for public participation in the legislative process, and pursuant to your advertisement referring thereto, PHAT! Intellectual Property wishes to formally make application of the subject referred to herein, and make the following amendments and notes as a prime stakeholder in the Kenyan Creative Industry.

Section 2: Definitions

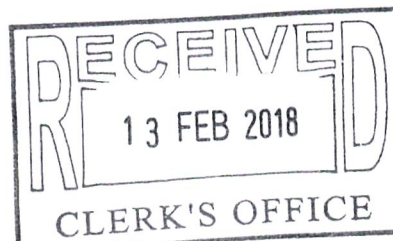
Section 2 of a statute often lays out the tone by terminology, and it therefore imperative that all pertinent issues in the Act are defined in the definitions. The phrases Technological Protection Measures under 26B and Computer Program under 26A both need to be defined to give a concise and unambiguous meaning to both provisions.

Section 3: Licensing of Copyright Works

The addition of Section 5 (fa) requiring the licensing of all dealers of Copyrighted works may need some reworking. It may be problematic to require such licensing, particularly in the Kenyan landscape where authors of Copyrighted works often sell their works themselves. This provision would therefore imply the requirement that authors are licensed as well, an eventuality which is likely not envisaged in the wording of this provision. Perhaps the most practical alternative method of implementing the sentiment in this provision would be to have a free or affordable registry of all dealers, which the Board would then only use to monitor as an anti-piracy effort.

Section 11: Artist Resale Right

While this provision is definitely in the right direction towards securing a longer term revenue right for visual artists, the infrastructure surrounding the royalty payment is not clearly outlined, even at least in the most basic way to later be expounded in the subsidiary regulation. It especially needs to be clear on how the seller, the art professional and buyer register the sale, and how then that the Board or another otherwise mandated institution shall be able to monitor and enforce the resale royalties.



[Handwritten signature]

The sale price cap may also need revision, with the state of our current industry in mind, where a lot of the art is sold and resold for under KES 20,000.

Section 15: Collection of Blank Tape Levy

As with Resale Royalties, the basic infrastructure surrounding collection and distribution of the Blank Tape levy is not clear; subsidiary legislation notwithstanding.

Section 16: Assignment of Copyright

The wording in this provision is that an assignment shall only be valid if so registered. This may be problematic since registration of Copyright is voluntary in the first place; so the mandated registration of assignment may pose an issue. We would therefore recommend that as echoed under our note in Section 3, an assignment registry should be free or affordable, to ensure maximum accessibility to the public for monitoring.

Issues not captured in the Bill

Virtual Private Networks (VPNs) & Pirate Sites

Much is discussed in the Bill regarding Technological Protection Measures, and Internet Service Providers' (ISP) liability. However, the Bill does not contain any airtight provisions that protect copyrighted works in the digital space accessed on pirate sites.

In the same way, VPNs, which in the digital space allow users to grey-import digital content, where providers did not intend for consumption in Kenya are currently still enabled in the Kenyan digital space with no liability on any party. This creates an atmosphere of unfair competition with local innovators against international content providers, even in cases where the content providers did not intend for consumption in the Kenyan market.

Furthermore, even in the instance that access to pirate sites is restricted as is recommended in the foregoing, would be an exercise in futility since the sites could very well be accessed through VPNs. The existence of pirate sites and VPNs directly infringes upon the rights of the content providers, thus going against the spirit of the Act in the first place. Flowing from the above, it is therefore our recommendation that ISP liability in the Act is extended to include the blocking of VPNs as well as Pirate Sites.

Copyright Licensing

The Bill, as is the Act, continues to be incognisant of other Copyright licensing models, which have already been long existent and tabled before WIPO for almost the whole past decade, and therefore should at least be mentioned and dealt with by our domestic law.

We look forward to a positive response and action from you, many thanks in advance.

Yours Faithfully,



Michael John Straño

Founding Director

PHAT! Music & Entertainment, trading as PHAT! Intellectual Property

AgDLS

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Zimbra

clerk@parliament.go.ke

RE: Copyright Amendment Bill, 2017- Aga Khan University Submissions

From : elizabeth.oyange <elizabeth.oyange@aku.edu>

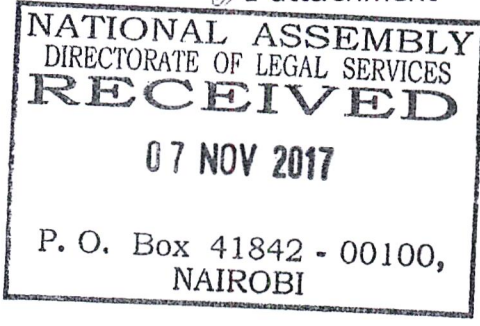
Mon, Nov 06, 2017 11:52 AM

Subject : RE: Copyright Amendment Bill, 2017- Aga Khan University Submissions

1 attachment

To : clerk@parliament.go.ke

Cc : normand.demers <normand.demers@aku.edu>, peter.gatiti <peter.gatiti@aku.edu>, elizabethoyange@gmail.com



Good morning Mr. Sialai,

I have been directed to you regarding comments to the Copyright Amendment Bill, 2017.

My name is Elizabeth Oyange, the Copyright Associate for Aga Khan University (AKU).

Having gone through the proposed Amendments, please find our comments in the attached word document. Please forgive my rusty legislative drafting skills, nonetheless, the comments boxes expand the explanations.

As our Copyright Office presently deals with the Copyright statutes of four other countries, we have noted that there are some things that work well in other jurisdictions that would very much be welcomed in Kenya.

We note in particular that being an educational institution, there is no educational exception for fair-dealing i.e. teaching. This is present in all our other AKU sister jurisdictions and many other developed copyright statutes. This is of importance because it has proven fairly difficult to try and bring any of our uses within the current four categories under s.26 (3) (i) (a).

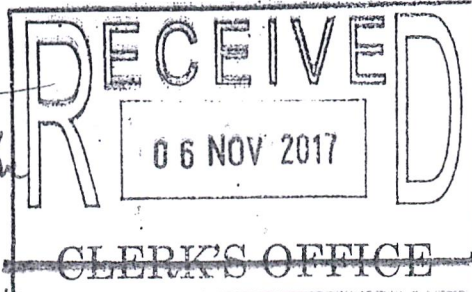
We have also noted that Dramatic works have been excluded from the works which should be afforded protection in copyright e.g. plays and thus recommend adding this category in the sections highlighted in the attached document.

We wish you all the very best in passing the Bill and are very excited about the new changes.

Regards,

Ms. L. Otieno, LC

Kindly forward to the Director, Committee for presentation to the relevant Committee for consideration. 07/11/17



Elizabeth Oyange
Copyright Associate,

Aga Khan University,
(South-Central Asia, East Africa, UK)

3rd Floor, Park Place Building,

2nd Parklands Ave , Off Limuru Road.

P.O. Box 30270-00100, Nairobi, Kenya.

Ext: 2418| +254 20 366 2418| 0721420447

www.aku.edu

THE COPYRIGHT AMENDMENT BILL 2017- Elizabeth Oyange.docx

30 KB

Mr. Michael Rotich Sialai, EBS
The Clerk, Kenya National Assembly,
Parliament Buildings,
P.O Box 41842-00100
NAIROBI
clerk@parliament.go.ke

THE COPYRIGHT AMENDMENT BILL, 2017

Suggested Amendments by Elizabeth Oyange [Copyright Associate; Aga Khan University]

Section 2:

"AUTHOR"

- By inserting the word "dramatic" immediately after the word "musical" in paragraph (a);
- By inserting the word "creation" immediately before the word "composition" in paragraph (b);

Commented [e1]: The inclusion of a "Dramatic work" is crucial in any Copyright Act and has been omitted in the Principal Act. This group of works covers Plays, screen play scripts.

"EXCLUSIVE LICENCE"

- By deleting the words "a licence" and substituting therefore the words "an authorization";

"FIXATION"

- By inserting the words "in a sufficiently stable or permanent form" after the words "representation thereof";

"INTERNET SERVICE PROVIDER"

- By deleting the word "person" and substituting therefor the word "entity";

Commented [e2]: Based on the new definition. ISP's are generally organizations or companies.

"LICENCE"

- By deleting the word "licence" and substituting therefore the words "right or interest";

Commented [e3]: To avoid explaining the word licence with the same word.

"ORIGINAL WORK OF ART"

- By deleting the word "himself";

Commented [e4]: Gender neutrality.

"PERFORMANCE"

- By inserting the words "acoustic or visual" immediately after the words "means the";

Commented [e5]: Amendment Bill.

“PERFORMER”

- By inserting the word “dramatic” immediately after the word “musical”;

Commented [e6]: Dramatic works are part of copyright protected rights.

“PUBLIC PERFORMANCE”

In paragraph (a) by inserting the word “in public” immediately after the word “process”;

Commented [e7]: Amendment Bill.

“SELLER”

By deleting the word “the artwork” and substituting therefore the words “any work”;

Commented [e8]: Applicable to the sale of any work and not only limited to art work.

“TECHNOLOGICAL PROTECTION MEASURE”

-By deleting the word “technical” and substituting therefore the word “technological”.

Commented [e9]: This term is mirrored by new section 26B and is the commonly used term in Copyright i.e. “technological protection measure”.

-By deleting the definition of “technical protection measure” and substituting therefore the following new definition;

“Technological protection measure” means any effective technology, device, component, system or process incorporated into a work to control access and restrict acts which after circumvention result in copyright infringement;

“WORK”

- By inserting the word “dramatic” immediately after the word “artistic”.

Commented [e10]: Amendment Bill.

By inserting the following new definitions:

“CHOREOGRAPHIC WORK” produced by the composition through sequence of the physical movements of the body whether in motion or form, including dance.

“CIRCUMVENTION”

Means to decrypt an encrypted work or to otherwise avoid, bypass, remove, deactivate or impair the technological protection measure, unless done with the copyright owner’s authority.

“COMPILATION”

A work resulting from the selection or arrangement of literary, artistic, musical, dramatic works or of parts thereof or a work resulting from the selection or arrangement of data”

"DRAMATIC WORK"

Includes any piece of recitation, choreographic work or mime, the scenic arrangement or acting form of which is fixed in writing but does not include a cinematographic work;

Section 22:

-By inserting the following new paragraph immediately after paragraph (c):

(d) dramatic works;

Section 23

s.23 (2) (i)

-By inserting the word "dramatic" immediately after the word "artistic";

s.23 (3)

-By inserting the word "dramatic" immediately after the word "artistic";

Section 24 (1) (b)

- By inserting the word "dramatic" immediately after the word "artistic";

Section 25

- By inserting the word "dramatic" immediately after the word "artistic";

Section 26(1)

- By inserting the word "dramatic" immediately after the word "artistic";
- S.26 (1) (a) inserting the words "or any substantial parts thereof" immediately after the word "reproduction";
- By deleting paragraph (b) and renumbering the subsequent paragraphs;

Section 26 (3)

-In subsection 1 (a) by deleting the word "scientific" immediately before "research";

-By deleting the words "current events" and substituting therefore the word "news";

Commented [e11]: Noting that the Berne convention clumps various works under 'literary and artistic works', it is nonetheless important to outline it as a separate category to enable users to adequately place their work in it. The preliminary Act makes reference to dramatic works in the definition of author but there is no inclusion of it as a type of protected work. Things like plays and pantomimes would be very difficult to bring under the other categories of 'literary or artistic works'.

Commented [e12]: Principal Act, Cap 130

Commented [e13]: This paragraph is exactly the same as paragraph (a)

Commented [e14]: The words "scientific research" limits fair dealing to only research within the field of science thereby locking out other areas of research e.g. in humanities and social sciences.

Commented [e15]: "Current Events" is too narrow as it does not include past events which may also be worth reporting. A category of News would capture the reporting of all events.

-By inserting a new category of "teaching" immediately after the words "private use";

- Section 26 (3) B. Educational Institutions

-In paragraph 1 (a) by inserting the word "dramatic" immediately after the word "literary";

- By inserting the following new paragraph immediately after section 26 (3) section B. subsection 1(e):

EDUCATIONAL INSTITUTIONS-

- The reproduction of a work for the sole purpose of teaching by an educational institution or one acting under its authority for educational purposes to the extent justified by the purpose including for use in printed and electronic course packs, resource lists and other material to be used in course instruction or virtual learning environments hosted in a secure network and accessible only by those giving and receiving instruction;
- Any other necessary act in order to display a work to the extent justified for the purpose;
- The reproduction, translation or performance in public within the premises of an educational institution,
- A work required as part of examination material;

LIBRARIES, MUSEUMS AND ARCHIVES

By inserting the following new subsections immediately after subsection 26 (3) C (i)

- A) The reproduction by a library, museum or archive for the maintenance or management of its permanent collection a copy of an original rare or out of print work which is deteriorating, damaged or lost or at risk of such-
- if the original cannot be viewed due to its condition or the atmosphere in which it must be kept;
 - where the original is in an obsolete format due to technological advances;
 - for the restoration of the original;
 - for police investigation or insurance,

Provided no other appropriate copy is commercially available in an appropriate medium of quality.

- B) An educational institution, library, museum or archive does not infringe copyright where a reproduction machine is installed with their approval for use by students, instructors, staff or users and there is a prescribed manner and location of a notice warning of the applicable copyright laws and the consequences of infringement.

Section 27 (1)

By inserting the word "dramatic" immediately after the word "artistic";

Commented [e16]: There has been contention about certain Copyright uses in class rooms which generally sho fall under teaching, and whether they can be used within ar of the other current 4 categories of Fair Dealing. The preser 4 categories are insufficient to address these types of use. Adding a new category of teaching explicitly covers the u of materials for teaching or instruction and as well as in examinations

Commented [e17]: To address the conundrum of use of copyrighted materials in various teaching platforms durin instruction.

Commented [e18]: To clarify that use of copyrighted materials in examination does not amount to an infringement.

Commented [e19]: Insert into Section C of the Second Schedule of the Amendment Bill to acknowledge instances where a copy is made in the public interest to safeguard t unavailability or likely unavailability of the original rare or longer published work for preservation purposes, providi is not possible to get another original copy if that work

Also include Museums in the title.

Commented [e20]: This will take away any liability for institutions which by placing copyright notices and warni near reproduction machines place liability on the users of those machines for unsupervised reproduction by notifying them of the copyright laws and the penalties for non-compliance.

Commented [e21]: The Principal Act

Section 35 (3) (a)

By deleting the words “technical measure” and substituting therefore the words “technological protection measure”;

Section 35 (9)

By inserting the word “dramatic” immediately after the word “literary”;

Section 35 (11)

By inserting the word “dramatic” immediately after the word “artistic”;

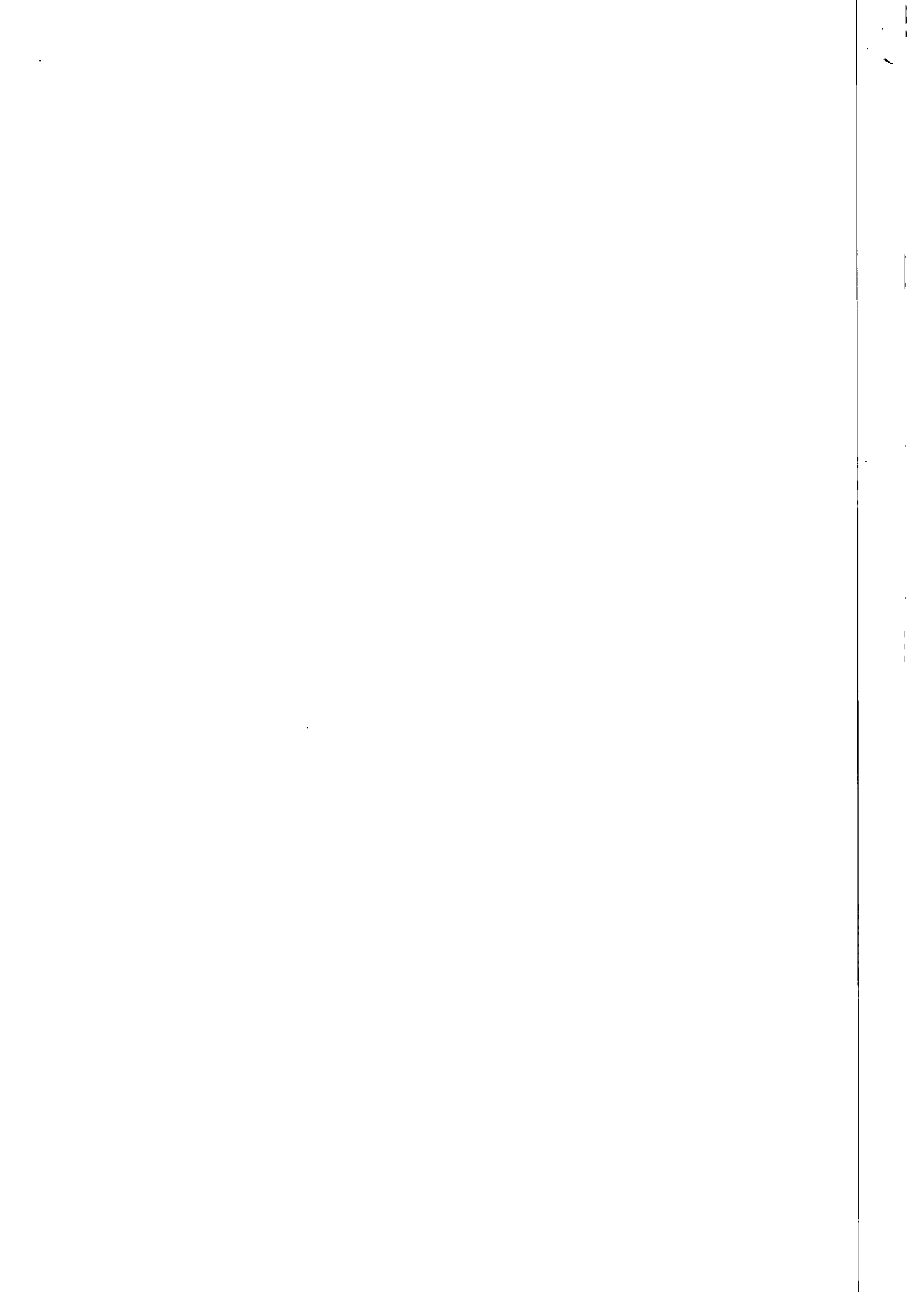
Commented [e22]: The Principal Act

Other considerations:

1. Delivery of books and newspapers to public libraries by a local publisher of one copy of the published book at their own expense within forty days from publication.
2. An open government licence for government works that are okay to re-use as per the specified terms.
3. After Section 38 (4) (c), by adding a new subsection of statutory damages in lieu of actual damages. Statutory damages are seen as an incentive for owners to register their copyrights with the copyright office and therefore instead of actual damages and profits, an owner can be awarded a statutory amount not less than e.g. 50,000/= and not more than 3,000,000/=.
4. **Internet Service Providers-**
 - They should be able to reject improper notifications of takedown;
 - They should provide forms on their websites with all the information necessary to make a valid claim;
 - The recipient may file an opposition against the ISP's decision to take down the data by sending electronic communication within 14 days from the providers notice and-
 - The ISP will then have 7 days after the receipt of the opposition to either reject it and continue blocking the content or accept the opposition and restore the content;
 - There shall be no liability on the ISP for continued blockage;
 - The ISP should give the identification of the person who filed the take down request.

Commented [e23]: To expand the breadth of local works and expand author outreach within Public libraries.

Commented [e24]: Figures should be reviewed. Those who do not register their copyrights before an infringement occurred should not be able to get an award of statutory damages, this way being an incentive for registration of copyright.



② Emergency 15
pls done
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IN THE MATTER OF CONSIDERATION BY THE NATIONAL ASSEMBLY

14/2/18

THE COPYRIGHT (AMENDMENT) BILL, 2017

THE HUMBLE MEMORANDUM OF VIEWS, PROPOSALS AND RECOMENDATIONS OF ALBERT GACHERU KIARIE, DIRECTOR MUSIC COPYRIGHT SOCIETY OF KENYA (MCSK)

1. PREAMBLE

I, Albert Gacheru Kiarie of Post Office Box Number 6613 – 00300 Nairobi, Mobile Telephone Number 0722 456 392, Email address kiarieag@yahoo.com do certify that, as a musician, music publisher, producer of sound recordings a member of MCSK and a director thereof, I have a undisputable stake holding in the copyright industry and, therefore, this Copyright (Amendment) Bill, 2017 has a direct impact on my life and my livelihood.

It is my sincere hope that these amendments will address the long overdue issues of collections of royalties from the users of copyrighted works. It is also prudent that it addresses the constitutional rights of all copyright holders, users and consumers of these copyrighted works putting more emphasis on the artists get the ultimium benefit from their creative works.

High in my hope is that this public participation exercise is for real and everyone will be given an opportunity to give their views and the same be taken in to consideration irrespective of their status.

My belief is that after these amendments all the hullabalooos that have bedeviled the copyright industry particularly the music industry will be a thing of the past. May God bless this exercise and every stakeholder in this copyright industry lives happier forthwith.

Amie 13/2/18



2. PARAGRAPH 2 OF THE BILL

The following terms be defined for the purposes of all stakeholders having an understanding of the kind of copyright they are dealing with.

- a) Communication to the public
- b) Performance in public places
- c) Public performance

3. PARAGRAPH 5 OF THE BILL

The proposed amendment of section 11 of the principal Act to increase the tenure of the executive director of the board from 5 years to 7 years is not fair for we have experienced officers getting drunk with power the longer they stay in an office. I, therefore, propose that the intended amendment be shelved.

4. PARAGRAPH 10 OF THE BILL

Subsection (1)(c) which read "The communication to the public" be further amended to read as follows: "The communication to the public of the whole work or a substantial part thereof either in its original form or in any form recognizably derived from the original"

Subsection (1)(f) which read "the making available of the work" be further amended to read as follows: "the making available of the work or a substantial part thereof either in its original form or in any form recognizably derived from the original"

A new subsection (1)(f) be introduced to read as follows: "performance in public places of the works or a substantial part thereof either in its original form or in any form recognizably derived from the original or a live performance of the works either in their original version or any other version recognizably derived from the original".

5. PARAGRAPH 15 OF THE BILL

Section 30A of the principal act was declared unconstitutional by the Malindi high court. It is important that the fate of this section clearly explained as to whether it is still in force or not.

13/2/18

6. PARAGRAPH 24 OF THE BILL

Section 46 of the principal act should be amended to provide that before a license is issued to any collective management organization (CMO) the board must be satisfied that the CMO has authority from the copyright holders of the category of rights it intends to collect for by having exclusive rights from the copyright holders through deeds of assignments.

It should also provide that before any CMO is denied license to collect royalties for its members the board should be satisfied that the members have assigned their rights exclusively to the CMO it intends to give license in its place by having signed deeds of assignments with the other CMO and that they have revoked their deeds of assignments with their former CMO. This is to avoid giving a license to a CMO which has not been given authority to collect for a certain class of copyright holders which action would lead to infringing on the constitutional rights of the said copyright holders.

This section should also provide that as many CMOs for any particular category can be registered as the copyright holders wish but only one CMO can be licensed to collect at any given time. It should also provide a transition period for members of one CMO to move to another CMO wherever the board declines to renew the license of a particular CMO. This is to ensure that constitutional rights of association and constitutional rights of choice of the affected members are not infringed on by the decision of the board of giving license to collect royalties to a new or another CMO.

7. PARAGRAPH 25 OF THE BILL

Section 46A has not been marked for intended amendments while in my own view it requires to be amended to make it be in tandem with the constitution by avoiding creating a gap in royalty collections which gap allows copyrighted works to be used for free contrary to the provisions of our constitution.

My humble opinion is this section should provide; "that pending the gazzettelement of new tariffs to be used by a particular collective management organization (CMO) the previously gazzatted tariffs to be applicable until the date of gazzettment of the new tariffs or the date appointed by the gazzettment to be the effective date".

GOD BLESS COPYRIGHT HOLDERS, COPYRIGHT STAKE HOLDERS, GOD BLESS KENYA.

DATED 13th THIS DAY February OF 2018

Signature 

BY ALBERT GACHERU KIARIE, MCSK DIRECTOR

TELEPHONE: 0722456392

EMAIL: kiarieag@yahoo.com

Zimbra

clerk@parliament.go.ke

RE: Copyright (Amendment) Bill, 2017- Comments

From : Shem Otanga <soo@africalegalnetwork.com>

Tue, May 22, 2018 05:28 PM

Subject : RE: Copyright (Amendment) Bill, 2017- Comments

6 attachments

To : clerk@parliament.go.ke

Cc : Anne Kiunuhe <AK@africalegalnetwork.com>, rwalala@gmail.com, ellakendi@gmail.com, karanidoreen@gmail.com, dimacadima@yahoo.com

*EMERSON
pls deaf
RA 25/5/18*

Dear Sirs,

We refer to the above matter and the hearing held before the Departmental Committee on Communications Information and Innovation on 17th May, 2018 in the boardroom on 2nd Floor at Continental House.

As agreed, please see my attached email of 13th February, 2018 attaching the complete set of written submissions which we made before the committee during the hearing. We also attach an MS Word version of the same.

Regards,

SHEM OTANGA | Senior Associate

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P P.O. Box 200-00606, Nairobi, Kenya



VISIONARY

AFRICAN LAW FIRM OF THE YEAR 2013, 2015, 2016

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From: Shem Otanga

Sent: Tuesday, February 13, 2018 6:56 PM

To: 'clerk@parliament.go.ke'

Cc: Anne Kiunuhe (AK@africalegalnetwork.com); Richard Simei Kasajja Byakika; John Okinyi Djan ga

Subject: RE: Copyright (Amendment) Bill, 2017- Comments

Dear Sir,

Further to our email of even date below,





Please see our final comments (attached) on the above Bill. Please ignore the interim comments which we sent earlier and which we intend to replace with the attached final comments.

Regards,

SHEM OTANGA | Senior Associate

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From: Shem Otanga

Sent: Tuesday, February 13, 2018 5:00 PM

To: 'clerk@parliament.go.ke'

Cc: Anne Kiunuhe (AK@africalegalnetwork.com); Richard Simei Kasajja Byakika

Subject: Copyright Amendment Bill - Comments

Dear Sirs,

We refer to the above matter and the notice published at page 19 of the Standard Newspaper and page 8 of the Daily Nation on 6th February, 2018.

We have perused the proposed Copyright (Amendment) Bill 2017 and have prepared the attached* *interim* memorandum of comments/recommendations for your consideration.

We shall forward the final version shortly.

Regards,

SHEM OTANGA | Senior Associate

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AFRICAN LAW FIRM OF THE YEAR 2013, 2015, 2016

 **COPYRIGHT (AMENDMENT) BILL 2017 FINAL COMMENTS - Final Clean.docx**
45 KB



Our Ref: TBA
Your Ref: TBA
Date: 13th February 2018

The Clerk of the National Assembly,
Parliament,
Parliament Road
Nairobi

Attention: Michael .R. Sialai, EBS

Dear Sir,

The Copyright (Amendment) Bill 2017 – Comments and Recommendations

We refer to the above matter and the notice published at page 19 of the Standard Newspaper and page 8 of the Daily Nation on 6th February, 2018.

We have perused the proposed Copyright (Amendment) Bill 2017 and have prepared the enclosed* memorandum of comments/recommendations for your consideration.

Yours faithfully,

Anne Kiunuhe
For ANJARWALLA & KHANNA

Memorandum

To The Clerk of the National Assembly
From Anjarwalla and Khanna
Date 13th February 2018
Subject **Comments and Recommendations in respect of the Copyright (Amendment) Bill, 2017 ("the Bill")**

A. THE COPYRIGHT (AMENDMENT) BILL 2017

1 Clause 2 of the Bill - Artwork vs. Original Work of Art vs. Artistic Work

Observation

Clause 2 of the Bill proposes the introduction of a definition for "artwork" and "original work of art".**Analysis**

The proposed definition of artwork refers to "visual art" which is an undefined term and also does not draw a clear distinction between it and "artistic work" under the Act. There also appears to be an overlap between artistic work under the Act and the definition of "original work of art" under the Bill.

Recommendation

We recommend that the distinction between the terms visual art, artwork, artistic work and original work of art be clearly set out as these terms appear to have an overlap which creates a lack of clarity.

2 Clause 2 (f) (ii) of the Bill – Infringing Copy (Transmissions)

Observation

Clause 2 (f) (ii) of the Bill proposes the amendment of the definition of "infringing copy" under section 2 of the Act by the introduction of a new paragraph (aa) which relates to the transmission of work under subsection (f) of Section 2

Analysis

This clause does not capture the infringing nature of the transmission

Recommendation

We would recommend the addition to this clause of the phrase "where such transmission constitutes an infringement of any rights protected by this Act; or".

3 Clause 2 (d) of the Bill – Copyright v Related Rights

Observation

Clause 2 (d) of the Bill proposes the amendment of the definition of “copyright” under section 2 of the Act by the addition of the phrase “related rights” after the word copyright where it appears in that definition.

Analysis

There is an accepted distinction between copyright (artistic, musical and literary works) and related rights (rights in sound recordings and broadcasts). The inclusion of related rights in the definition ought to take cognisance of this. We believe this is the intent of this amendment.

Recommendation

We recommend that the phrase to be introduced through this amendment be altered from “related rights” to “and related rights.”

4 Clause 2 (l) of the Bill - Definition of Commercial Resale

Observation

Clause 2 (l) of the Bill proposes the introduction of the definition of “commercial resale” which reads as follows: *“‘commercial resale’ means the subsequent re-transfer of ownership in artwork from one person to another for monetary consideration with the involvement of an art market professional”*

Analysis

The definition is unclear in that it refers to “the subsequent re-transfer” but does not specify what this retransfer is subsequent to.

Recommendation

We recommend that this definition be re-worded so as to clarify the event which the re-transfer is subsequent to.

5 Clause 2 (l) of the Bill - Definition of Internet Service Provider

Observation

Clause 2 (l) of the Bill proposes the introduction of a definition for the term “Internet Service Provider”. The proposed definition appears to contain typographical errors such as: (a) the reference to “information services” as opposed to “information system services”; and “systems” instead of “information systems” both of which are defined terms proposed to be introduced under the Bill

Analysis

The typographical errors are likely to cause interpretational difficulties or confusion if they are not corrected.

Recommendation

We recommend the correction of these errors so as to cause the corrected definition to read as follows: “ Internet Service Provider *means* any person providing information system services,

information systems, or an access software provider that provides or enables computer access by multiple users to a computer server including connections for, the transmission or routing of data;”

6 Clause 2 (l) of the Bill - Definition of Organisation

Observation

Clause 2 (l) of the Bill includes the definition of the word “organisation” is defined as a collective management organisation (CMO) approved and authorised by the board.

Analysis

It appears that the intention was to provide a definition of the term “collective management organisation”.

Recommendation

We recommend that of the defined term be amended to read “collective management organisation”.

7 Clause 2 (l) of the Bill - Definition of Resale Royalty Right

Observation

The definition of “resale royalty right” proposed at Clause 2 (l) of the Bill contains a typographical error in the form of the omission of the word “an” before the phrase artist or group of artists...”

Analysis

This is a minor error that can be to ensure the amendments are grammatically sound.

Recommendation

The word “an” should be included accordingly so as to cause the corrected definition to read as follows “ ‘resale royalty right’ means the right of an artist or group of artists or successors to receive royalty on commercial resale of an artwork”

8 Clause 2 (l) of the Bill - The Definition of Public Performance

Observation

Clause 2 (l) of the Bill proposes the inclusion of definitions for “public performance” and public display”.

Analysis

These two definitions bear several overlaps to the extent that they both capture the showing of a work to the public without the need for communication to the public.

Recommendation

The definitions should be amended so as to draw out the intended distinction between the two as the same is currently unclear.

9 Clause 10 of the Bill – Copyright in Architectural Works

Observation

Clause 10 of the Bill proposes the repealing of section 26 of the Act and its replacement by a new section 26. Subsection (2) of the proposed new section 26 provides for copyright in a work of architecture and limits the same by indicating that it shall not include the right to control the reconstruction of a building to which that copyright relates “in the same style as the original”.

Analysis

The inclusion of the words “in the same style as the original” obscures the meaning of this subsection.

Recommendation

We would recommend that the phrase “in the same style as the original” at the end of subsection (2) be reworded or deleted.

10 Clause 10 of the Bill – Nature of Copyright (Making a work available)

Observation

Clause 10 of the Bill proposes the introduction of a new section 26 (f) that provides that one of the acts that are subject to the exclusive control of a copyright owner is the “making available of the work”.

Analysis

This subsection is unclear in its scope as it merely talks about the making available of the work but fails to specify the person(s) to such availability of the work is made or the manner in which this is done.

Recommendation

We recommend that this subsection’s clarity be improved so as to avoid any doubt as to when an individual’s activity falls within its remit.

11 Clause 11 of the Bill – Visual Artists

Observation

Clause 11 of the Bill proposes the creation of collective management organisations by visual artists to manage the artiste resale rights provided for under the proposed section 26D.

Analysis

The term “visual artists” is not defined in the Bill.

Recommendation

We recommend the inclusion in the Bill of a definition of the term “visual artist”.

12 Clause 11 of the Bill – Minor Errors

Observation

Clause 11 of the Bill proposes the introduction of a new section 26C (1) (b) of the Act but includes grammatical and typographical errors.

Analysis

The typographical errors are likely to cause interpretational difficulties or confusion if they are not corrected.

Recommendation

We recommend that the wording at the start of this proposed section 26C (1) (b) be changed to read as follows “....the making, importing, distribution or sharing of accessible format copies...”.

13 Clause 11 of the Bill – Minor Errors

Observation

Clause 11 of the Bill proposes the introduction of a new section 26D to the Act. Clause 26 D (1) states that “the artist resale right shall be valid as long as copyright continues to subsist in an *original work art*”.

Analysis

The reference to “original work art” appears to be erroneous and would make more sense if it was replaced by “artwork”. Our reason for this analysis is that the subsequent subsections refer to “visual artists” which is a term that appears in the proposed definition of “artwork” under the Bill. Further, the typographical errors are likely to cause interpretational difficulties or confusion if they are not corrected.

Recommendation

The reference to “original work art” should be replaced by “artwork”. Further, in the proposed subsection (4) the wording should be changed to read as follows: “the resale royalty shall be payable at the rate of five percent of the *net sale*...” (as opposed to “sale net sale”)to amend the typographical error in this subsection.

14 Clause 11 of the Bill – Undefined Rules

Observation

Clause 11 of the Bill proposes the introduction of a new section 35A (1) (b) (iii) to the Act. This new section 35A (1) (b) (iii) makes reference to “rules” that are not defined in the proposed amendments.

Analysis

Further, the absence of clarity on what the said “rules” are is likely to cause difficulties in the operationalization of this provision.

Recommendation

We recommend that greater clarity is provided in terms of what the rules referred to in subsection (iii) are and direction be given as to where to find these rules or by whom they shall be promulgated.

15 **Clause 19 of the Bill – Take Down Notices**

Observation

Clause 19 of the Bill proposes the introduction of a new Section 35B to the Copyright Act (**the Act**). The proposed section 35B (1) states that a person whose rights have been infringed by content to which access is being provided by an Internet Service Provider (ISP) may request that ISP, by way of a takedown notice, to remove the infringing content. Once this takedown notice is issued (in accordance with the requirements in section 35B (2), the ISP, as per section 35B (4):

“shall disable access to the material within forty eight hours unless it receives a counter notice from the entity accused of infringement by making available the content fulfilling the requirements set out for a takedown notice and contesting the contents of the takedown notice”

Analysis

The Bill proposes a two-step notice-and-takedown procedure for ISPs to disable access to allegedly infringing material. These are (a) the receipt of a valid take down notice and (b) the subsequent disabling of access to the infringing content.

The proposed section 35B (4) contemplates the possible issuance of a counter notice by the owner of the alleged infringing content. However, it places no obligation on the ISP or the party issuing the take down notice to notify the alleged infringer of the existence of the take down notice so as to enable the alleged infringer to prepare and present the counter notice. In our view, this obligation ought to be set out in the law.

Recommendation

We recommend the inclusion in the Bill of a process for notifying the alleged infringer of the take down notice so as to allow them to respond with a counter notice. If the accused entity does not respond within a specified time, then the takedown notice may be effected however if the accused entity chooses to prepare a counter notice, then the matter could be referred to the Copyright Tribunal or the a Court of competent jurisdiction

We also recommend that the beginning of section 35B (5) be amended to read “an internet service provider” as opposed to “the internet service provider” and the beginning of section 35B (6) be amended to read “Any internet service provider” as opposed to “Any service provider”.

16 **Clause 25 of the Bill - Collective Management Organisations**

Observation

Clause 25 of the Bill proposes to introduce a new section 46C to the Act which refers to the formation of “a collective management organisation” in relation to authors, producers, performers etc.

Analysis

From the wording of the proposed section 46C appears that only one collective management organisation may be formed manage the varying copyright interests of these various stakeholders.

Recommendation

We recommend that this subsection be amended to reflect the fact that each of these different parties, i.e. authors, producers, performers, visual artists and publishers may form their own separate collective management organisations to manage their respective interests as opposed to having one CMO handling their claims.

43

Kamp

Kenya Association of Music Producers

Our Ref: KAMP/BOD/12/18/2

12th February 2018

THE CLERK OF THE NATIONAL ASSEMBLY,

12TH PALIAMENT

P.O.BOX -41842-00100

NAIROBI

(ATT: MR. MICHAEL R.SIALAI, EBS)

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12/2/18

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14/2/18

Dear Sir,

RE: SUBMISSION OF THE MEMORANDA –THE COPYRIGHT AMENDMENT BILL, 2017

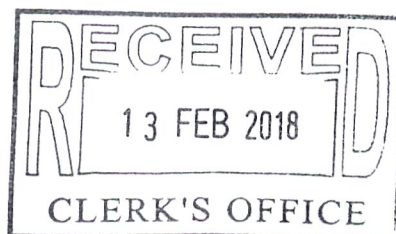
Kenya Association of Music Producers (KAMP) is a Collective Management Organization registered by Kenya Copyright Board under S.28 of the copyright act to manage rights of Producers of Sound recordings. As per your recent advert in the local dailies for the public to make submissions on the amendments as above, we have collated views of our members, and we and we shall appreciate if you will admit our issues as tabulated in the table attached to be included in the amendments.

Looking forward for positive consideration for our input in this very important process that affects producers of sound recordings

Yours Faithfully

Clifford Mabele Wefwafwa

CEO- Kenya Association of Producers



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			<p>recordings and of manufacturers and importers blank media or failing such agreement by the Copyright Tribunal appointed under section 48.</p> <p>(5) All claims for compensation under this section shall be made through an organization representative of producers of sound recordings and the compensation shall be collected by the Board and distributed to the respective copyright collecting society registered under section 46.</p>	<p>copyright and related rights as it ensures compensation of the rights holders for copies made and no royalties are collected.</p>
3	28 (2) (1)	No Provision	<p>Insert the following subsection: “ The provisions of paragraph 28 (2) (1) shall apply <i>mutatis mutandis</i> to the copyright in sound recordings</p>	<p>This is an important provision s it relates to exceptions and limitations in relation to use of technological protection measures</p>
4	28A	No Provision	<p>Equitable remuneration for sound recordings Propose the following</p> <p>(1) If a sound recording published for commercial purposes, or a reproduction of such sound recording, is used directly for broadcasting or other communication to the public, or is publicly performed, a single equitable remuneration for the performer or performers and the Producer of the sound recording shall be paid by the user to the producer.</p> <p>(2) Unless otherwise agreed between the performer or performers and the producer, half of the amount received by the producer under subsection (1) shall be paid by the producer to the</p>	<p>This was section 30A which was deleted through a legal notice in 2016 after High Court Judgement that declared it unconstitutional due to lack of public participation when it was enacted. It is an important provision for related rights as it covers areas, which do not fall under exclusive rights and ensures proper compensation especially in the digital environment.</p>

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			<p>performer or performers.</p> <p>(3) The right to an equitable remuneration under this section shall subsist from the date of publication of the sound recording until the end of the fiftieth calendar year following the year of publication or, if the sound recording has been published, from the date of fixation of the sound recording until the end of the fiftieth calendar year following the year of fixation.</p>	
5	S.30B	<p>1) Subject to the provisions of the sections 28& 30 of this act, the Kenya Revenue Authority or any other designated entity by the board shall collect on behalf of collective management organizations licensed to represent performers and owners of sound recordings.</p> <p>2) All claims for compensation under this section shall be made through the collective management organizations representative of performers and producers of sound recordings.</p> <p>3) The level of royalty payable shall be agreed between the collective management organizations representing performers and producers of sound recordings and organizations representing manufacturers</p>	<p>We propose that the whole section is deleted and replaced with the following:</p> <p>1. Subject to s.28 & 30 of this act, a collective management organization licensed to represent producers of sound recordings shall collect or can a body to collect on their behalf and on behalf of any other beneficiary of this right.</p> <p>2) - This should remain as it is.</p> <p>3. This is acceptable and should remain.</p>	<p>We have reservations if KRA is allowed to collect considering the red tape that may arise when it comes to remitting the same. The general practice in other countries is that this right is administered by the producers of sound recordings since they are the most affected by private copying.</p>

#REF!

	<p>and importers of audio recording equipment, Audio blank tape and media intended for recording or failing such agreement by the board.</p> <p>4. The Share to respective right holders of the private copying remuneration shall be determined by the board through a notice from time to time.</p>	<p>4.delete this and Insert the following -----“ the share to respective right holders to private copying remuneration shall be agreed upon by the respective collective management organizations representing producers of sound recordings and performers”</p>	<p>It is only fair that the affected right holders are left to decide on how they wish to share revenue realised based on the best practices. The board should remain to carry out its mandate as a regulator not a participant in the process</p>
6	38	<p>Section 38 of the principal act is amended by inserting a new clause (a) – makes available by way of downloading, streaming, communication to the public, uploading, and storing and file sharing.</p> <p>Subsection 4 of the said act is therefore amended to cater for the above insertion by deleting the proposed (a), (b), (c), (d) or (e) and substituting them with (a) and retaining:- shall be liable to a fine not exceeding four hundred thousand shillings or to imprisonment for a term not exceeding 10 years or both. Thereafter, subsection 4 changes to 5 and expressions (a), (b), (c), (d) or (e) are deleted and substituted with (b), (c), (d), (e) or (f). The sequence of numbering follows in that order.</p>	<p>Due to technological advancement, physical copies of sale of copyrighted works are no longer preferred. We need to realign our laws to conform to the reality. This is fundamental.</p>

Submitted on behalf of The Board of Directors - Kenya Association Of Music Producers (KAMP)

By:



Clifford Mabele Wefwatwa,
CEO - KAMP

Kenya Association of Music
Producers (KAMP)
P. O. Box 51149 - 00200
Nairobi, Kenya.



Anthony Karani,
Kamp-Board Member.



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Kamp

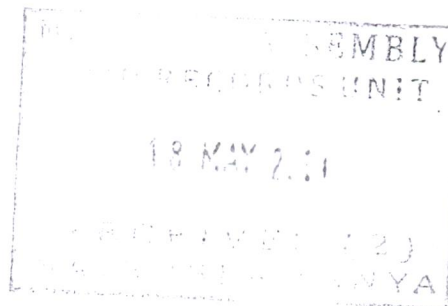
Kenya Association of Music Producers

Our Ref: KNA/05/18

18th May 2018

22/5/18

THE CLERK OF THE NATIONAL ASSEMBLY
CLERKS CHAMBER'S,
NATIONAL ASSEMBLY,
PARLIAMENT BUILDINGS,
P.O. BOX 41842-00100
NAIROBI.



Dear Sir,

RE: CONSIDERATION OF THE MEMORANDA ON COPYRIGHT (AMENDMENT) BILL, 2017.

Following your invitation for us to appear before the Departmental Committee on communications, Information and Innovation on Wednesday, 16th May 2018, we honored the invitation and after deliberations, we were asked to further clarify and/or reinforce our argument, which we hereby do.

Why K.R.A. cannot collect all royalties (Except for Blank tape levy).

Based on international best practices or global benchmark, revenue authorities do not control collection activities because:-

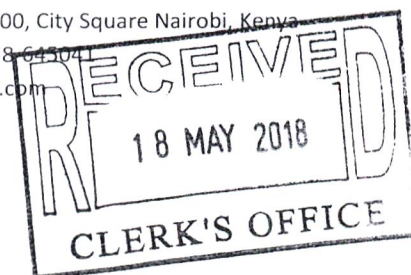
1. Copyright is complex subject that requires rigorous training to fully comprehend. Collection involves different tariffs ranging from flat fees, to calculation of audible area and percentage of revenue. Also, rates depend on whether tariff is for all rights or combination of rights i.e. musical works (MW), Sound recording (SR) and Audio Visual (AV) Tariff. For K.R.A. officers to start collecting effectively, this may take years unless there is a collaboration between the already established systems (CMOs) and K.R.A., which will in effect starve the industry even the little money they get from CMOs.
2. Conflict of Interests. Societies negotiate with customers and government should not be seen to be involved in such. EACC report on corruption in government departments is also a concern that cannot be ignored especially when the law creates a loophole.
3. CMO's often have to submit opinions in hearings on government legislative proposals and it will be inappropriate if the government argued its own case.
4. IP is private property, and CMO's act on behalf and in the interests of the rights holders. So the basic approach and global trend is that rights holders should themselves form such organizations to manage their rights and that government should not directly control these activities. Besides, CMOs submit their audited reports for scrutiny and questioning to their members before an AGM and also to the regulator.
5. The red tape involved in releasing the money collected from government is a hindrance to development of the industry. Whereas in a CMO, a member is free to inspect books of accounts at any time by just giving reasonable notice to do so, can query expenses, have to approve any major

Jumuia Place 1, Second Floor, Lenana Road, Kilimani | P.O. Box 51149 – 00200, City Square Nairobi, Kenya

Tel: +254 20 2378963 | Cell: +254 710-309695, +254 738-643041

Email: info@kamp.or.ke | licensingqueries@gmail.com

www.kamp.or.ke | www.payforplay.or.ke



expense and above all has the right to elect a leader of his/her choice after every three years, government can opt to remain silent while a rights holder suffers without recourse.

6. Kenya is a signatory to the various IP treaties and in particular the Berne convention, which calls for member states to protect copyright for other member countries with the same zeal as they protect their own under what is referred to as "National treatment". It's only through reciprocal agreements between organizations bestowed with the task of collecting royalties that Kenya can, and has successfully complied with this obligation. It would be ridiculous and absurd for a government body to enter into an agreement with a member based association of another country.

In the rare cases where government controlled such activities, the societies or CMO's stop growing and being active like Sweden (Government had to pull out) or there will be no collections at all like in Tanzania where the government body has been unable to collect and grow the Industry. **It is therefore our considered opinion that S.30B amendments should be as we have submitted.**

How K.R.A., the amendments and the Government can help in maximizing collections:

K.R.A.

1. K.R.A. can form a government private partnership with the respective CMO to collect, at a commission for one right-the blank tape levy also known as private copy remuneration. This is a levy that the law provides to fairly compensate an owner of sound recording on imported audio recording equipment's or audio blank tapes used for recording and other media intended for recording (including internet if our proposal to include making available is adopted) levied on importers and manufacturers of such devices. They are best suited to collect this royalty at the port of Entry (entry points for the imported devices) or at the manufacturers depot/Custom bonded warehouse. CMOs have no capacity to collect this levy on their own.
2. As part of their bargain, CMOs can assist KRA on collection, educating and sensitizing their members and/or music industry stakeholders who are largely informal and non-compliant on tax issues.
3. We are ready to surrender 3% commission as agency fee to KRA for this service.

Copyright amendments:

1. Our submissions on areas that need amendments should be considered.
2. The proposed Copyright tribunal and KECOBO should be given more powers to reign on infringers and errant CMO board members without necessarily getting involved in running CMOs.
3. A new bill establishing an industry self regulating body (like the Law Society of Kenya and others) that has teeth and licenses or approves all dealers in Intellectual Property. This will eradicate situations where county Governments, bodies like Communications Authority and liquor licensing board allows a trader to operate while not respecting or infringing on copyrights of creators. In the alternative, an amendment that allows KECOBO to clear license seekers on traders likely to infringe on copyrights before the relevant licensing body issues a license. For example, you do not just register a name and start enrolling students to class before an authorization from the ministry. We believe with such measures, big users of recorded music like media houses (whom incidentally we have an MOU with but is yet to be honored) will be compelled to pay for use, which will be a big boost to the industry as CMOs will be enabled to meet the required 70:30 ratio of operational costs vis-à-vis royalty distribution thereby making everybody satisfied.

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4. Due to low levels of compliance by Media houses, the Communications Authority of Kenya (CAK) should only license Media houses that have complied with CMO-Collective Management Organizations' licenses. This will go a long way in improving payments to Members / rights holders.
5. The copyright tribunal to be given quasi judicial roles to determine the myriad of copyright differences as a court of original jurisdiction in matters of copyright. This will improve the time taken by courts to dispense with matters. Besides, the law should allow for statutory damages that can be fixed and the tribunal can award this comfortably.

Government:

1. Should enforce good corporate governance practices through a Transparency, Accountability and Governance (TAG) certification or policy.
2. Direct supervision of CMOs (KECOBO and more importantly Copyright Tribunal)
3. Approving tariffs that have been negotiated and gazetted.
4. Controlling operations of CMOs through competition law. This aims at preventing the societies from abusing their de facto or de jure dominant position in the market place.
5. It is the constitutional role of the Government to protect and promote the Intellectual property rights of the people of Kenya. As such, the Government has a duty to empower KECOBO to do exactly that by providing finances that can allow KECOBO's presence to be felt in all counties. It is a mockery to have a body like KECOBO, with such a huge task, affording just to be situated in Nairobi with a handful of enforcers who cannot be effective even in a section of Nairobi only.
6. Legislative support of collective management. Legislation on copyright and related rights is an important part of the legal fabric of a country. It is in the interest of the public Authorities that this legislation works in practice and serves the interests for which it was adopted,
7. Namely essentially to stimulate creativity and thereby promote the cultural, social and economic development. So in short Public Authorities/Government have therefore an interest in ensuring that the law actually is implemented.

Yours faithfully,



Anthony Karani Murimi

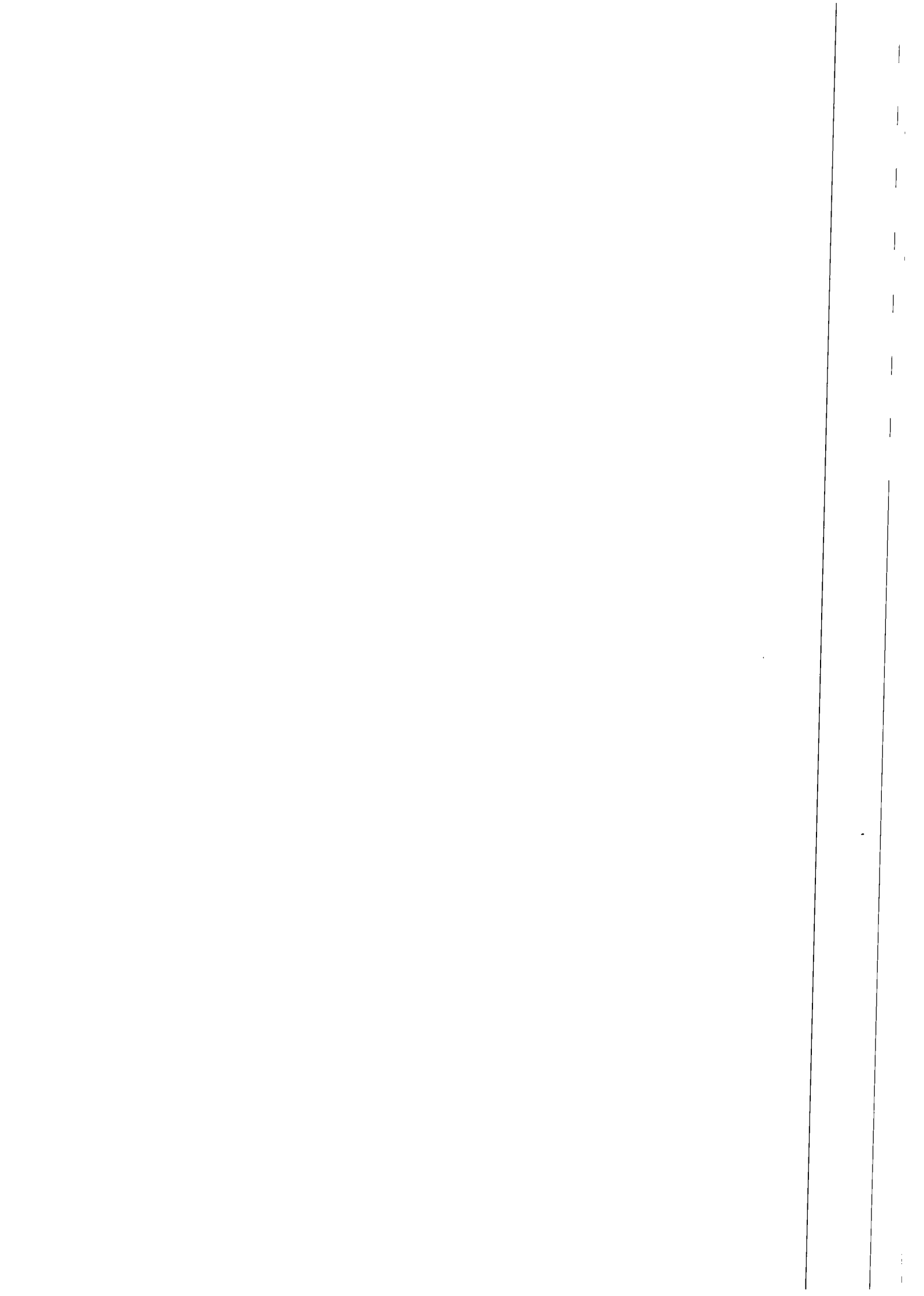
Producer & Director –Kenya Association of Music Producer

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The Copyright (Amendment) Bill 2017 - Submission of Memorandum of Views

Prepared by the Association of Disc Jockeys East Africa
Box 42844-00100
Nairobi

① DJ/Committee

13/2/18

Submitted to

The Departmental Committee Communication, Information and Innovation,
The National Assembly, Twelve Parliament of Kenya

② Ameyen
pls deaf
FA 14/2/18

Date: Monday 12th February 2018

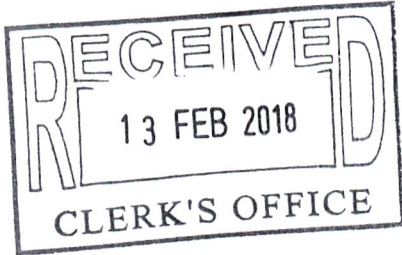
The ADJ is a membership association committed to the welfare of DJs in Kenya. We have some proposals for consideration by Parliament:

- 1. That the only offender that can be arrested in the case of noise pollution from a venue/event be the license holder of the venue/event and not the DJ. The DJ is a service provider
- 2. That the compilation of various artistes into a DJ mix should not be a criminal offense, as it is a key avenue for building our East African musicians and artiste brands

Signed

Jacqueline Mugo (DJ Shock)
Founder, Association of Disc Jockeys East Africa
Tel. 0723787303

Email: djshockafrica@gmail.com





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The Copyright (Amendment) Bill, 2017

Submission of Memorandum

Prepared by the Creative Economy Working Group
Box 66872-00800
Nairobi

Submitted to

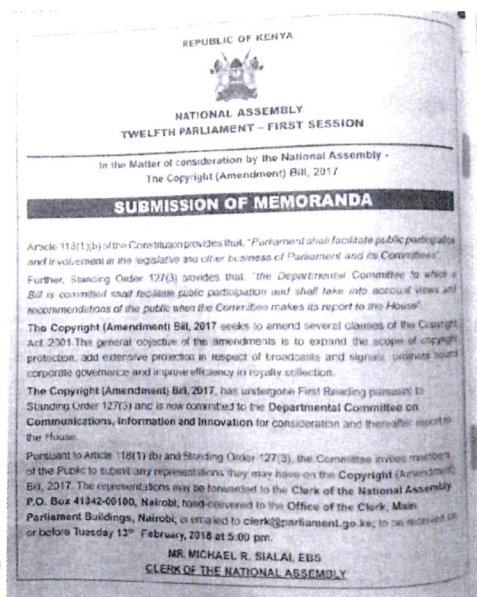
The Departmental Committee Communications, Information and Innovation

The National Assembly, Twelfth Parliament of Kenya
Nairobi

And

The Senate, Twelfth Parliament of Kenya
Nairobi

12 February 2018



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We make reference to the Notice inviting members of the public to submit representations on the Copyright (Amendment) Bill, 2017. We thank the Departmental Committee on Labour and Social Welfare for inviting copy right stakeholders for input aimed at improving Copyright Act, Cap. 130. We appreciate being consulted on the current amendment and recognise it as an opportunity to highlight other problematic sections of the parent law, and offer our considered rationale for the repeal and re-enactment of the Kenya Copyright Act.

The Constitution of Kenya requires the law to ensure optimal benefits to the *bona fide* copyright owners. Therefore the need for the Copyright Amendment is apparent and overdue. In the amendments, due consideration should be given to the establishment of a firm governance framework and mechanism to facilitate protection of copyrights and related rights without imposing undue barriers to the growth of the creative economy, access to information and knowledge and freedom of expression in Kenya.

Kenya does not have a 'National Intellectual Property Policy' which would establish the philosophical basis creativity, guide copyright law development and reform principles. As we await the development of that policy and the resultant legislation, we welcome the Amendment Bill as the interim measure. However, we strongly call for the repeal of the current Act at a future stage and the enactment of a more comprehensive re-written Bill supported by a policy framework.

The Creative Economy Working Group, a network of practitioners in the culture and creative industries, hereby submits the annexed Memorandum of Views for your consideration.

Our submission is in three parts. **Part A** delves into amendments proposed under this Bill; **Part B** highlights sections of the current Act while **Part C** offers rationale for the repeal and subsequent re-enactment of the Copyright Act. To widen inclusive consultations, strengthen legislative transparency, build trust and encourage public participation, we urge all future legislative proposals by State agencies be prepared by independent Multi-Stakeholder Forces, with the line enforcement Executive agency serving as Task Force Secretariat.

We pray that our Memorandum deserves your due attention and consideration.
Respectfully submitted,



Prof. Kimani Njogu
Chairman
Creative Economy Working Group



About The Creative Economy Working Group (CEWG)

The Creative Economy Working Group (CEWG) was founded by thirteen institutions working in the culture and creative sector in 2012 in order to explore how a facilitative policy and legislative framework could be developed for the advancement of culture, arts and media in Kenya. Previously, members of the Working Group had been actively involved in entrenching rights related to artistic and cultural expression in the Constitution of Kenya. At that time the group met as the Consultative Committee on Culture and the Constitution and worked closely with the Ministry of Culture. With the promulgation of the Constitution in 2010, the Committee was disbanded and some members reconvened to form the Creative Economy Working Group to focus mainly on policy and legislative issues related to the creative sector in Kenya and within the East African Community through advocacy, knowledge sharing forums, publications and partnership building.

The following institutional members of the Creative Economy Working Group endorse the Memorandum of Views.

Institution:

1. Content Development & Intellectual Property Trust
2. The GoDown Arts Centre
3. Twaweza Communications
4. Kenya Actors' Guild
5. The Creative Garage
6. Kwani Trust
7. The Book Bunk
8. GoSheng Services
9. Docubox - EADFF
10. Content House
11. The Nest Collective

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Section	Title	Proposal	Justification
Part A - Specific amendments proposed under this Bill¹			
2	Interpretation. 1. New "artist" ²	<p>1. Insert after definition of "artistic work" a new definition: "artist" means a person who creates artistic works.</p> <p>2. Define "musical work" as follows: 'means a work consisting of music, irrespective of musical quality, and includes any graphical notation of such work and works composed for musical accompaniment.'</p> <p>3. Retain the definition of "broadcast" in the Act</p> <p>4. Insert the word "broadcast" after "audio visual work" in the proposed definition of "work."</p> <p>5. Definition of "copy"- insert the word "deliberate", non-native and or user-installed to read as: 'deliberate reproduction of work in any manner or form and includes any sound or visual recording of a work and any permanent or transient storage of a work in any medium, by non-native and or user-installed computer</p>	<p>1. To disambiguate: whereas 'artistic work' is defined, the person who creates such 'artistic work' is undefined.</p> <p>2. The proposed definition of 'musical works' does away with the words "<i>irrespective of musical quality</i>". This is not advisable since these words are crucial to ensure artistic neutrality in copyright. Further, it is proposed to replace "any works composed for musical accompaniment" with "graphic notations". Graphic notations describe the representation of music through visual symbols outside the realm of traditional music notations also referred to as 'diagrammatic notations'. In as much as graphic notations is a suitable amendment to this definition, it must be noted that it does not completely substitute any works composed for musical accompaniment, which is an important inclusion in this definition. Accompaniment is the musical part or parts which provide rhythmic and or harmonic support to the melody, main themes of a song or instrumental piece that do not necessarily appear in graphic form.</p> <p>3. The word 'broadcast is mentioned 39 times in the Act without its definition provided.</p>

¹ These amendments relate to *The Copyright (Amendment) Bill, 2017* as currently proposed before Parliament

² "artist" therefore includes (but not limited to), actors, sculptors, performers, singers, dancers, visual artists, photographers, architects, handicrafts, jugglers, etc.

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		technology or any other electronic means;"	<p>4. Broadcasts fall under the category of works eligible for copyright under the Act.</p> <p>5. Avoid criminalising the use of the Internet which by architectural design creates transient content (cache and cookies) on every instance which lasts for a short time or is technically necessary for Internet to function.³ Inserting the word "deliberate" holds the individual internet user innocent unless otherwise proven to have purposely introduced copyrighted content onto their computing equipment or devices. It also holds innocent those users whose computers are hacked, attacked by viruses, <i>malaware</i> and other malicious, foreign installed software. Furthermore, some computers have factory-made remote access holes. The infringement burden of proof rests with the claimant NOT non-infringement burden of proof on the user. This also applies to "Technology Protection Measures".</p>
	Technology Protection Measures	"Non-native or user installed technological software, tools and other electronic mechanisms to protect copyright on works in digital forms"	<p>(a) Defines "technological protection measures" and</p> <p>(b) Insulates innocent users from foreign or external originated faults or infringement</p>

³ See Intellectual Property Brief, 'Viewing Cached Copyrighted Content Isn't Infringing , UK Supreme Court Says' <https://www.ip-watch.org/2013/05/07/viewing-cached-copyrighted-content-isnt-infringing-uk-supreme-court-says/>

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2(e)	Folklore	Restore definition of “folklore”	(a) Folklore Protection obligated by Article 11 of the Constitution of Kenya. (b) <i>The Protection of Traditional Knowledge and Cultural Expressions Act, 2016</i> ⁴ does not define “folklore”(c) The Protection of Traditional Knowledge and Cultural Expressions Act, 2016 is apparently ‘an orphan’ law (for which the proposed remedy is below). Deleting the definition creates room for mischief earlier corrected by law.
2(j)	Definition of “school”	<p>1. “school” has the meaning assigned to it by the Basic Education Act, 2013, Education Act (Cap. 211), Universities Act (Cap 210B) or any other institution promoting learning and is recognised under international obligations or instruments.</p> <p>2. Delete Second Schedule (B) ‘Educational to “The exclusive rights under section 26 shall not include the right to control the inclusion in a collection of literary or musical works of not more than one page from the work in question if the collection is designed for use in a school or any university established by or under any written law”</p> <p>3. Delete “art market professional” definition</p>	<p>1. Defining “school” only under Basic Education Act, 2011 excludes (a) secondary schools (b) universities (c) inter-governmental, non-governmental and non-profit organisations learning schools from copyright exceptions and limitations.(e.g. UNESCO, Commonwealth of Education, etc) – recognised under ‘1’ - “authorised entity” means non-profit basis and includes a government institution or non-profit organization that provides the same services to beneficiary persons as one of its primary activities or institutional obligations;</p> <p>2. (a) This provision negates away ‘Fair Dealing’ exceptions granted to schools. Contradictory legal provision exposes schools to suits for exercising ‘Fair Dealing’ exception. (b) Questionable logic behind “not more than one page” in view of principle of proportionality, for example, a “1 page” and a “1,000-page” copyrighted Works.</p> <p>3. “art market professional” defined but not applied anywhere on Bill.</p>

⁴ http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/ProtectionofTraditionalKnowledgeandCulturalExpressionsAct_No33of2016.pdf

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5	Functions of the Board.	<ol style="list-style-type: none"> 1. Delete 'licence all dealers of copyright works'. 2. Insert "To administer the relevant provisions of the Traditional Knowledge and Cultural Expressions Act, 2016 and any other mandate that may already be available in any other statute." 3. in paragraph (g), Delete the proposed words "and enforce" immediately after the word "administer". 4. Related to (g) above: 42. Powers of arrest Delete the words: "...and any officer of the Board who at the time is wearing a visible badge of office and authorized thereto in writing by the Board, may arrest, without warrant, any person, who, in his presence, commits any such offence, and may detain such person until that person can be delivered into the custody of a police officer to be dealt with according to law" 5. Insert: "A Director appointed under this section shall serve for a period of three years and shall be eligible for re-election for a further single term of three years." 6. Insert: "There shall no Conflict of Interest among Board Members, Management or Staff of KECOBO" 	<ol style="list-style-type: none"> 1. Does introduction of 'dealers' and licensing them advance or obstruct growth in copyrighted works? If it obstructs, then delete this provision. If it advances, then see (2) below. Delete not referenced anywhere] 2. The Bill should provide a definition of "dealers" under section 2 as well as a supporting regulatory framework. The Bill should include an express mandate related to the 'traditional knowledge digital repository'. Given that the Traditional Knowledge Act mandates KECOBO with certain aspects of implementation, then the Copyright Act ought to reflect the same. 3. KECOBO is granting unto itself the copyright security law enforcement powers while it is a Copyright Regulation Administration entity not a constitutionally mandated organ contrary to Article 239 of the Constitution on National Security Organs. 4. Authorising any officer wearing a KECOBO 'badge' law enforcement powers, including search, seizure and arrest without warrant, illegal detention powers "... to detain such person until that person can be delivered into the custody of a police officer to be dealt with according to law" additionally violates Fundamental Freedoms on the Bill of Rights on the Constitution of Kenya. 5. Aligns with (a) SCAC/<i>Mwongozo</i> Board appointments and (b) harmonises with Section 46B(2) - CMO Board Appointments
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			6. Conflict of Interest violates fundamental governance principles at the Board, Management and or institutional operational levels.
6	Composition of the Board		<p>1. Reduce number of Board Directors (from current 21 Members) in line with <i>Mwongozo Principles</i> and Rationalise the number of Board Directors to ensure that rights holders in all works eligible for copyright are represented.</p> <p>2. Avoid 'hard-wiring' named external organisations into the body of the Act - the law should be more generic to outlive external entities.</p>
11	Qualifications of Executive Director.	<p>1. Delete proposed section 11(2)(d) and replace with "a postgraduate degree in law or related fields with demonstrable and proven experience in the field of intellectual property, particularly copyright and related rights."</p> <p>2. Amend Section 11(1) by including the words: "Provided that the Executive Director shall hold office for a renewable term of three years, subject to a maximum of two terms."</p>	<p>1. Section 11(2)(d) is non-inclusive. The proposed qualifications make it mandatory for the office holder to have a "Master of Laws degree in the field of intellectual property" may have the undesired effect of locking out other qualified intellectual property professionals that may have similar or higher qualifications in other relevant fields.</p> <p>2. The process and instruments of appointment and term limit for the Executive Director ought to be in line with others Agencies and/or as advised by State Corporations Advisory Committee ("SCAC"). Therefore, the appointment should be competitive conducted by the Board after which the top two qualifying candidates are forwarded to the Cabinet Secretary for appointment of one of them.</p> <p>3. The appointment term should be limited to three (3) years renewable for an additional one (1) term only - Executive Director should not hold office in perpetuity.</p>

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26	Copyright and Related Rights.	<ol style="list-style-type: none"> 1. Insert "Deliberate" before "Circumvention of technological Measures" on Section 26(B) 2. Consider implications of 26(D) 3. Insert immediately after s26(j) the following: 'Provided that subject to the provisions of this section the owner may elect to use open licenses such as creative commons, free and open source licenses and open educational resources.' 	<ol style="list-style-type: none"> 1. Holds innocent computers users compromised by third parties technologies without their knowledge or intent. Burden of proof rests on complainant.(see also "Copy" under interpretation⁵) 2. Resale Rights: The proposed section introduces the artist resale right. While a resale right, or "<i>droit de suite</i>", has been introduced in a number of European jurisdictions, there is no universal consensus on its benefits, even for the artists it supposedly seeks to benefit. What empirical evidence is there to suggest that the Kenyan art market, and indeed artists, would benefit from a resale right? Consider Actors request of a 2.5% resale rights to be collected from broadcasters by CMOs on their behalf, extend to resale of diverse other property. 3. Exceptions and limitation ought to be incorporated and enforcement cognisant of these rights under copyright law.
29	Nature of copyright in broadcasts	<ol style="list-style-type: none"> 1. Delete section 29(c) 	<ol style="list-style-type: none"> 1. Section 2 should retain the current definition of 'broadcast' in the Act to be consistent with section 22 (1) (f). The word 'broadcast' is mentioned 39 times in the ACT. The proposed section is incomplete without a definition of 'broadcast' which is proposed deleted in section 2 of the Bill. (see comment above).

⁵ See also: Free Software Foundation 'The Intel Management Engine (ME) is a grave threat to the freedom, privacy, and security of computer users' at <https://www.fsf.org/blogs/community/intel-management-engine-2013-take-action>

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30	Rights of performers	<ol style="list-style-type: none"> 1. Delete the words 'Kenya Revenue Authority' and replace with 'a private company or any other similar entity designated by KECOBO to collect royalties with respect to single equitable remuneration.' 2. Replace the words 'Section 30B' with 'Section 30A'. 3. Consider reinstating Section 30A which was deleted by the Statute Law Miscellaneous Amendments Act, 2017 to take care of weak entities in the Copyright value chain 	<ol style="list-style-type: none"> 1. Burdening tax-funded public entities which perform public services with the collection of private property revenues/royalties is in our view, improper. Thus KRA must be relieved of the duty of collecting royalties. 2. Section 30A on single equitable remuneration was deleted by the Statute Law Miscellaneous Amendments Act, 2017. The entity designated by KECOBO should collect for all rights under collective management organisations. Therefore amendments should apply for copyright and related rights under sections 26, 27 and 28 in line with the recommendations by the Presidential Task force on Parastatal Reforms.
35	Infringement. (Section 35A)	<p>Rephrase Section: 35A.(1) An Internet Service Provider shall not be liable-</p> <p>(d) for damages incurred by a person if the service provider refers or links users to a webpage containing infringing material or facilitates infringing activity, by using information location tools including a directory, index, reference, pointer or hyperlink where the Internet Service Provider</p> <p>(i) does not have actual knowledge that the material is infringing the rights of that person;</p> <p>(ii) is not aware of the facts or circumstances from which the allegedly infringing activity or infringing nature of the material is not apparent;</p> <p>(iii) removes or disables access to, the reference or link to the content or the infringing activity after being</p>	<ol style="list-style-type: none"> 1. Need to protect ISPs from hoax, vexatious and baseless requests to remove content and/or where the person requesting the removal has no legal basis. 2. Our proposed amendment will ensure that the person lodging the take down notice will ensure that the notice complies with the criteria set out in section 35B for take-down requests 3. The proposal on Bill turns ISPs into arbiters - to consider requests from persons claiming to be copyright owners and peruse the affidavits on ownership and on the attempts made to contact the websites hosting the infringing material. It is therefore possible for an ISP to be dragged into copyright ownership and infringement disputes. This is especially so because of the provision on enforcement that requires compliance with a takedown notice, malicious or not, within 48 hours. 4. An intermediate step should be introduced between notice by the copyright owner and action by the ISP. This middle step would

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		<p>informed that the content or the activity infringes rights of a person [in accordance with section 35B]</p> <p>1. The impugned websites will have the right to file counter notices with the ISPs. The Bill is however silent on what the ISP is to do in case a counter notice is filed.</p> <p>The Bill does not anticipate competing claims. It is therefore possible for an ISP to be dragged into copyright ownership and infringement disputes. This is especially so because of the provision on enforcement that requires compliance with a takedown notice, malicious or not, within 48 hours.</p>	<p>require the copyright owners to obtain an injunction order from the court. Thus it is the court that would instruct the ISPs to disable access to infringing content.</p>
	<p>Infringement. Section 35B(1)</p>	<p>Rephrase Section 35B(1) to:</p> <p>“A person whose rights have been infringed by content to which access is being offered by an Internet Service Provider may request, by way of a takedown notice, that Internet Service Provider removes the infringing content.</p> <p>(2) A takedown notice issued under subsection (1) shall—</p> <p>(a) be in writing and addressed by complainant or his agent to the Internet Service Provider or their designated agent;</p> <p>(b) contain the full names and telephone, physical and email address of the complainant;</p>	<p>1. To prevent overbroad and non-specific take down requests, and save ISPs from the risk of taking down lawful content and having to figure for themselves where the infringing content is online, takedown requests for material that is stored on a website or online server should include all web addresses and URLs that uniquely identify that material.</p>

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		<p>(c) be signed by the complainant or his authorized agent;</p> <p>(d) describe in specific detail the copyright work subject to the alleged infringement or sought to be removed;</p> <p>(e) identify the rights being infringed;</p> <p>(f) set out the content sought to be removed with details of where the content is contained [including the unique online address or other unique identifier];</p> <p>(g) attach an affidavit or any other declaration attesting to claim of ownership, validity of the rights, good faith and setting out any efforts to have entities responsible for making the content available to remove the content;</p> <p>(h) be copied to the Board, Communication Authority and the recognised umbrella association of service providers.”</p>	
	<p>Infringement Section 35B(4)</p>	<p>Rephrase 35B(4) to: “An Internet Service Provider shall disable access to the material expeditiously and within <i>expeditiously with a role for the Competent Authority to adjudicate</i>, considering the circumstances of the case unless it receives a counter notice from the entity accused of infringement or any other person exercising a legal right by making available the content fulfilling the requirements set out for a</p>	<p>1. Requiring take down within 48 hours is unfair and unworkable for ISPs. There’s need to consider the complexity of the take-down requests: The ISP needs more time to assess whether the content is actually lawful. Some content may require language translation. some notices may be sent during non-working days. Each take-down request needs to be considered on its own unique circumstances.</p>

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		<p>takedown notice and contesting the contents of the takedown notice.”</p>	<p>A 48 hr notice would mean ISPs may not have enough time and they will tend to remove content automatically, which will lead to a form of censorship.</p> <p>This will also hurt ISPs business, because in order to comply they will need to dedicate a lot of resources for dealing with take-down notices within a short time. The short time-line will incentivize people who may not have a proper basis to file take down requests, leading to a vicious cycle raising the compliance burden for ISPs.</p> <p>2. It should not be the case that only a person who has been accused of infringement can file a counter-notice. Sometimes the person filing the takedown notice could be wrong about who the uploading/infringing party is; or the uploaded content may be subject to a joint ownership; or the copyright to it may have been assigned. It may also be that the content may be in the public domain or owned by the government and therefore many parties may exercise a public-interest right to counter the takedown notice.</p> <p>Ensure due process and rational safeguards in copyright enforcement and protect from censorship through copyright balancing with access to information which is a fundamental right.</p>
46	Collective administration of copyright	<p>1. Delete the words “or where administrative shortfalls are apparent” in proposed section 46(3A) and replace with “or where the Board in its discretion finds that the requirements of the Act have not been fully complied with”.</p>	<p>1. The term “administrative shortfalls” is broad and not clearly defined. 2. There is need to have a rationalised escalation of sanctions starting with a caution, a warning, a penalty and finally deregistration with reasonable right of appeal ensuring natural justice to the Collecting Society.</p>

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		<ol style="list-style-type: none"> 2. Amend Section 46(11) to specify graduated sanctions and an appeal process for Collecting Society Board Members and Management under this section, sequentially “a caution, warning, penalty and finally de-registration and appeal” 3. Delete Section 46B(1): 4. Rephrase Section 46B(3) to: “A Director elected as a chairperson of a collective management organization shall hold office for a period of three years and shall be eligible for re-election for a further single term of three years.” 5. Delete Section 46B(4): 6. Insert a section imposing CMO revenues collected transparency by obligating KECOBO to regularly publish such information obtained from CMO and how the same was disbursed to copyright holders. 7. Insert new subsection, 46(D) (7) “The Executive Director of KECOBO shall regularly publish books, accounts and other financial records obtained under this ACT.” 	<ol style="list-style-type: none"> 3. The terms and conditions for service of the CEO of the CMO should be determined by the Board of the CMO. [KECOBO should Regulate NOT ‘Control’ independent Collecting Societies]. This Section undermines the authority and reasoning of the Board of Directors and members of the CMO to hire and fire a CEO. 4. (a) Eliminates terms of appointment double standards on Chairperson of KECOBO Board vs Chairperson of CMO (b) aligned with SCAC/<i>Mwongozo guidelines</i> 5. The law should be stable, predictable and reliable and applied uniformly/blindly. Coding undefined “special circumstances” creates room for legal uncertainties and unpredictability. 6. Section 46D is silent on revenue transparency 7. Section 46D silent on KECOBO information on CMO revenue transparency. Duplicating revenue transparency requirement on KECOBO and CMO eliminates doubt.
48	Copyright Tribunal.	<ol style="list-style-type: none"> 1. Insert;The mandate of the Tribunal should be expressly provided and to include arbitration of disputes between rights holders. 	<ol style="list-style-type: none"> 1. The mandate of the Tribunal is unspecified nor are its terms of appointment and functions fully stated. 2. Promote Alternative Dispute Resolutions include arbitration and

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		2. Insert: "Tribunal constitutionally aligned and meets the test for fairness. Adopt alternative forms of dispute resolution including reconciliation, mediation and arbitration."	mediation.
II	Second Schedule: General exceptions and limitations	<p>1. In the proposed section A(1)(a), delete the words "the purposes of" immediately after "for" and replace with "purposes such as".</p> <p>2. Fair Dealing: Insert a new section immediately after A(1) which reads: "In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—</p> <p>(*1*) the purpose and (*2*) character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;</p> <p>(*3*) the nature of the copyrighted work;</p> <p>(*4*) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and</p> <p>(*5*) the effect of the use upon the potential market for or value of the copyrighted work."</p>	<p>1. Underscore the fundamental objective of 'Exceptions and Limitations.' The Bill provides for a closed list of purposes for dealing which may be restrictive for users of copyright works</p> <p>2. In its current form the Bill reverses jurisprudence on the five factor (of six⁶) test for fairness provided by the Supreme Court of Kenya in the 'Digital Migration' case. New legislation ought to further develop not retard legal growth.</p> <p>The 6 test are:</p> <ul style="list-style-type: none"> (i) The purpose of the dealing (ii) The character of the dealing (iii) The amount of the dealing (iv) Alternatives to the dealing (v) The nature of the work (vi) The effect of the dealing on the work <p>3. Does not provide a criterion for determining 'fairness'. It is the purpose for the dealing and not the person or institution engaged in fair dealing.</p>

⁶ https://en.wikipedia.org/wiki/CCH_Canadian_Ltd_v_Law_Society_of_Upper_Canada#Fair_dealing

Section	Title	Proposal	Justification
Part B – Other problematic provisions grounding the repeal and re-enactment of the Copyright Act⁷			
2	Definitions	<ol style="list-style-type: none"> 1. Insert ‘Royalty means a payment to an author or owners of rights for use of their work where prior authorisation was granted.’ 2. Insert ‘Cultural Expression has the meaning assigned under the Traditional Knowledge and Cultural Expressions Act, 2016.’ 	<ol style="list-style-type: none"> 1. ‘Royalty’ is used in over 10 provisions elsewhere in the Act yet no definition is provided in this section. 2. The proposed deletion of ‘Folklore’ creates a vacuum with respect to KECOBO’s mandate under the Traditional Knowledge and Cultural Expressions Act, 2016.
4	Headquarters	Delete the full stop and insert the following words “as the National Office with branches at county level”.	The section suggests that KECOBO will only have one office in Nairobi. This does not conform with Chapter 2, 9 and 11 of the Constitution on devolution.
8	Conduct of business and affairs of the Board	Insert immediately after s8(2), the following: ‘The conduct and regulation of the business and affairs of the Board shall be in accordance with highest standards of ethics, integrity and good conduct in line with Article 10 of the Constitution, the Mwongozo Code among other applicable good governance frameworks that may be applicable from time to time.’	There is no corporate governance framework for the Board.

⁷ Highlights of other problematic Sections of the Copyright Act grounding the repeal of the Copyright Act

THE ECONOMY OF
Creativity

9	Remuneration of Board members.	Insert immediately after the last sentence of s.9 the following: 'Such remuneration, fees and allowances paid to Board members by KECOBO should be made a matter of public record.'	There is no requirement to allow public access to information on remuneration, fees and allowances paid to Board members by KECOBO.
19	Accounts	Insert a new subsection (4) as follows: 'The accounts of the Board under this section shall be made available on its official website as soon as practicably possible.'	There is no requirement to allow public access to information on all books and records of accounts of KECOBO income, expenditure, assets and liabilities. Such books and records of accounts by KECOBO should be made a matter of public record.
21	Appeals	<ol style="list-style-type: none"> 1. Replace the words "Competent Authority" with "Copyright Tribunal". 2. Delete the words 'and such decision shall be final.' 	<ol style="list-style-type: none"> 1. The Competent Authority is proposed to be renamed as the Copyright Tribunal but this proposed change has not been reflected in this section. 2. Section 21(3) appears to oust the jurisdiction of the High Court and other subordinate courts.
26	Nature of copyright	<p>Insert immediately after (a), as follows: '(b) In determining whether an act done in relation to a work constitutes fair dealing or fair use, all relevant factors shall be taken into account, including but not limited to—</p> <ul style="list-style-type: none"> (i) the nature of the work in question; (ii) the amount and substantiality of the part of the work affected by the act in relation to the whole of the work; (iii) the purpose and character of the use, including whether— <ul style="list-style-type: none"> (aa) such use serves a purpose different from that of the work affected; and (bb) it is of a commercial nature or for non-profit research, library or educational purposes; and (iv) the substitution effect of the act upon the potential market for the work in question.' 	To align the fair dealing provision with the decision of the Supreme Court in the Digital Migration case.

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Creative

38	Offence and penalties for infringement	Amend subsection (10) as follows: 'All fines imposed and recovered by a competent court in respect of the contravention of any of the provisions of this Act or of any regulations made thereunder shall be paid into the general revenues of Kenya.	Any direct financial benefit to KECOBO from fines could encourage rent-seeking and bounty hunting on the part of the Board.
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Section	Title	Proposal	Justification
Part C – Rationale for the repeal and re-enactment of the Copyright Act⁸			
[Repeal Act]	New Title	Repeal Copyright Act and re-enact	Overly voluminous Copyright (Amendment) Bill 2017 span 64 pages amending parent Act 37 of pages (double) Guiding legal principle ought to be the interests of the local creators, as espoused on the Constitution of Kenya.
[new]	Payola	Prohibit and penalise payola	Illegal payola payments by content promoters to broadcasters to distort creative economy marketplace
[new]	Exemptions and Limitations	Prohibit copyright enforcement overreach to the weakest and most disadvantaged individuals	Redress inequitable, unjust, high-handed enforcement reinforcing the one purpose of rule of law - to protect the rights of the smallest minority that has ever existed — the individual. Law must not lessen but instead widen exceptions and limitations, respecting public right to access to information.
[new]	Compulsory Licensing	Compel mandatory minimum contractual conditions	Protect copyright owners from themselves - address the imbalance of power on negotiation between individual copyright owners and established large institutional entities
[new]	Open Licensing	Recognise copyright owners right of use over their own Works under Open Licensing Frameworks	Current Act based on wrong premise that *All Works* for sale Correct ignorance of Kenya's obligations under international Open Licensing instruments, for example, UNESCO on OER

⁸ Highlights of some provisions not provided for by the Copyright Act further grounding the repeal and re-enactment of the Copyright Act

THE ECONOMY OF
CREATIVITY

[new]	Intermediary Restrictions	Provide for legal restrictions on intermediary violation of users fundamental rights provided by the constitution.	Copyright law overly awarding intermediaries with unconstitutional surveillance powers, burden of duty and or penalising on failure to comply interfere with Fundamental Rights, such as, Privacy of communications.
[new]	Jurisdiction	Set the legal framework for cross-border copyright violations with due process oversight	The Copyright (Amendment) Bill, 2017 and parent Act are weak or silent while Internet penetration continues to grow
[new]	Freedom of Speech	Provide for	Safeguard from censorship disguised as copyright 'copyright enforcement.'

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MEMORANDUM

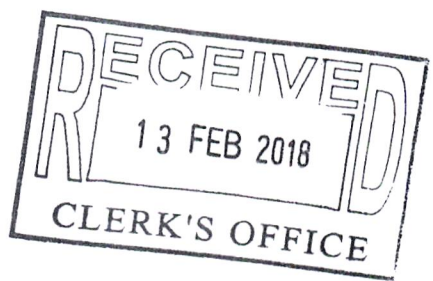
FROM: MMC AFRICA LAW
TO: NATIONAL ASSEMBLY
DATE: 13th February, 2018

Background

The Copyright (Amendment) Bill, 2017 (the Bill) proposes to amend the Copyright Act significantly. In particular, it makes various definitive amendments, as well as changing the legal conceptualization of copyright and related rights in Kenya. Further, it proposes to reinforce the administration of collective management organisations (CMOs) while expressly proposing the establishment of a Copyright Tribunal.

It seeks to domesticate provisions of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled that entered into force in Kenya on 2nd September 2017, and also provides for contemporary developments like internet service provider (ISP) liability in copyright infringement.

While we commend the stellar effort and progress in coming up with the Bill, we have a few comments on improvement which we set out in the memorandum below:



Applicable Statute	Proposed Amendment	Reasons and Justifications
<p>Copyright (Amendment) Bill, 2017</p>	<p>Clause 9 of the Bill which introduces a new section immediately after section 22 of the Copyright Act, 2001 to be amended as follows:</p> <p>9. The principal Act is amended by inserting a new section immediately after section 22-</p> <p>22A (1) "The Board shall keep and maintain a record called the Register of copyright, wherein shall be entered all registered copyright and related works with the names, addresses and description of their proprietors, notification of assignments and transmissions, the names, addresses and description of all licensees, conditions, limitations and any such other matters relating to registered copyright as may be prescribed."</p>	<p>The objective is to provide clarity as to the rights that may be recorded in the register. This includes the right to absolute proprietorship, assignments, transmissions, licenses and any other limitations or conditions on relating to the registered copyright work.</p>
	<p>Clause 9 of the Bill which introduces a new section immediately after section 22 of the Copyright Act, 2001 to be amended to include section 22B to the Copyright Act, 2001 immediately after the new proposed section 22A as follows:</p> <p>Application and registration of copyright</p> <p>22B (1) A person claiming to be the proprietor of copyright and who is desirous of registering it shall apply in writing to the Board in the format prescribed for registration in the Register.</p> <p>(2) The Board shall examine an application for registration and consider whether the works are eligible for registration as copyright under section 22 of this Act.</p> <p>(3) Subject to the provisions of this Act, the Board may refuse the application, or may accept it absolutely or subject to such conditions or limitations as it may think right.</p>	<p>The objective is to enhance the new proposed section 22A (2) which provides for Registration of all works eligible for copyright. It sets out the process of application and registration of copyright. The registration process introduces advertisement of any intended registration so as to invite third parties to oppose to any unlawful registration and also ensures that the public is aware of any proprietorship claims for various copyright works.</p> <p>This section also provides an avenue where parties are invited to prove ownership of the works sought to be registered prior issuance of the certificate. It also allows other parties to challenge title in copyright work where they have proof that it was obtained through fraud, illegality or misrepresentation</p>

Applicable Statute	Proposed Amendment	Reasons and Justifications
<p>Copyright (Amendment) Bill, 2017</p>	<p>(4) In the case of a refusal or conditional acceptance, the Board shall state in writing the grounds of its decision and the decision shall be subject to appeal to Copyright Tribunal.</p> <p>(5) When an application for registration of copyright has been accepted, whether absolutely or subject to conditions, or limitations, the Board shall cause the application as accepted to be advertised in the prescribed manner, and the advertisement shall set forth all conditions and limitations subject to which the application has been accepted.</p> <p>(6) Any person may, within the prescribed time from the date of the advertisement of the application, give notice in writing to the Board, stating the grounds of opposition to the registration.</p> <p>(7) The Board shall send a copy of the notice to the applicant and invite the applicant to file a response within the prescribed time, stating the grounds which he relies for his application, and if he does not do so, he shall be deemed to have abandoned his application.</p> <p>(8) If the Board receives a copy of a response from the applicant, it shall furnish a copy to the person giving a notice of opposition, and shall after hearing the parties if so required and considering the evidence, decide whether any registration is permitted.</p> <p>(9) The decision of the Board shall be subject to appeal to the Copyright Tribunal.</p> <p>(10) Where an application for registration of copyright in the Register has been accepted and either the application has not been opposed and the time for notice of opposition has expired; or the application has been opposed and the opposition has</p>	

Applicable Statute	Proposed Amendment	Reasons and Justifications
	<p>been decided in favor of the applicant, the Board shall unless the application has been accepted in error, register the copyright in the Register. The copyright shall be registered as of the date of the application of registration, and the date shall be deemed for the purposes of this Act to be the date of registration.</p> <p>(11) Upon registration of a copyright, the Board shall issue the applicant with a certificate of registration of the copyright in the prescribed form under the hand of the executive director and seal of the Board.</p> <p>(12) The certificate issued by the Board shall be taken by all courts as <i>prima facie</i> evidence that the person named as proprietor of copyright is the absolute owner, and title of that proprietor shall not be subject to challenge except where the certificate was obtained illegally, by fraud or misrepresentation to which the person is proved to be a party.</p>	
<p>Copyright (Amendment) Bill, 2017</p>	<p>Clause 16 of the Bill which amends section 33 of the Copyright Act to be amended as follows:</p> <p>16. Section 33 of the principal Act is amended –</p> <p>(b) in subsection (3) by deleting the words “and the written assignment of copyright shall be accompanied by a letter of verification from the Board in the event of an assignment of copyright works from outside Kenya” and inserting the words.</p> <p>“as evidence of personal acceptance of that instrument. Parties to this instrument shall appear before an advocate of the High Court of Kenya who shall explain to them, in a language they understand, the effect of the instrument before signing. Parties shall then sign the instrument in the presence of the advocate of the High Court of Kenya, who shall also sign and stamp a</p>	<p>The objective is to ensure that parties to a contract clearly understand the contract before signing. This is to counter instances where parties may not understand the effect of the contract they are signing. It also imposes a duty on the advocate witnessing execution of such contracts to explain to the parties the consequences of the contract and that they freely and voluntarily agree to be bound by the contract.</p>

Applicable Statute	Proposed Amendment	Reasons and Justifications
	<p>certificate to the effect that the instrument was signed in his presence having explained to the party in a language they understood and that they identified them and acknowledge that the signature appended in the document belongs to them and that they signed the documents freely having understood the contents of the instrument.”</p>	
<p>Statute (Miscellaneous Amendments) Act, No.11 of 2017</p>	<p>Law</p> <p>Act,</p> <p>Section 30A of the Copyright Act, 2001 which was deleted by the Statute Law (Miscellaneous Amendments) Act, No.11 of 2017 is reintroduced by inserting the following section immediately after section 30</p> <p>30A. Right to equitable remuneration for use of sound recordings and audiovisual works</p> <p>(1) If a sound recording is published for commercial purposes or a reproduction of such recording is used directly for broadcasting or other communication to the public, or is publicly performed, a single equitable remuneration for the performer and the producer of the sound recording shall be paid by the user through the respective collective management organization, and the remuneration shall be shared equally between the producer of the sound recording and the performer.</p> <p>(2) If a fixation of a performance is published for commercial purposes or a reproduction of a fixation of a performance is used for broadcasting or other communication to the public, or is publicly performed, a single</p>	<p>We take note that the much-disputed section 30A of the Copyright Act was deleted by the Statute Law (Miscellaneous Amendments) Act, No. 11 of 2017. We propose re-introduction of this section so as to ensure equitable remuneration for all artistes. This section recognizes the rights of producers and performers in sound recordings and audio-visual works. It also appreciates the role of collective management organizations who manage royalties on behalf of various stakeholders.</p>

Applicable Statute	Proposed Amendment	Reasons and Justifications
	<p>equitable remuneration for the performer shall be paid by the user to the collective management organization.</p> <p>(3) The right of equitable remuneration under this section shall subsist from the date of publication of the sound recording or fixed performance until the end of the fiftieth calendar year following the year of publication, provided the sound recording or fixed performance is still protected under section 28 and 30.</p> <p>(4) For the purposes of this section, sound recordings and fixations of performances that have been made available by wire or wireless means in such a way that members of the public may access them from a place and a time individually chosen by them shall be considered as if they have been published for commercial purposes.</p>	
<p>Copyright (Amendment) Bill, 2017</p>	<p>Clause 25 of the Bill be amended by deleting the words “or any other post-secondary qualification obtained after a period of at least more than one-month study” as follows:</p> <p><i>46B (1). A member of the collective management organization shall be eligible for election as a director if he holds degree, a certificate or a diploma</i></p>	<p>The objective is to increase the threshold for qualification of directors of a collective management organization by ensuring directors are duly qualified and have acquired requisite leadership and governance skills.</p>
<p>Copyright (Amendment) Bill, 2017</p>	<p>Clause 25 of the Bill be amended by inserting the words “jointly” immediately after the word “accruing” in the proposed section 46C to read as follows:</p> <p>46C Authors, producers, performers, visual artistes and publishers may form a collective management organization to</p>	<p>The proposal of a section 46C to provide for the possibility of authors, producers, performers, visual artists and publishers forming a CMO seems to reflect the various calls by stakeholders for bringing together of the various existent CMOs. However, the language proposed here is ambiguous. The suggested revision would express this intention clearly. This</p>

Applicable Statute	Proposed Amendment	Reasons and Justifications
	collect, manage and distribute royalties and other remuneration accruing <i>jointly</i> to their members	would be in the interests of stakeholders as it would reduce the burden of liaising with different CMOs and personnel when dealing with the same type of work or related works
Copyright (Amendment) Bill, 2017	<p>Clause 24(k) of the Bill proposing to insert a new subsection 46(10) be amended to add a proviso to subsection 46(10) of the Copyright Act, 2001 as follows:</p> <p>46(10) The Board shall cause the organisation to be de-registered only after a written notice delivered or sent by registered post to the organisation at its last known address, requesting the organisation to make written representations, within a period of 21 days from the date of the notice, with respect to any such failure(s) to be detailed in the notice</p> <p><u>Provided that the Board may also invite any registered members of the organisation to make written representations in relation to such failure(s)</u></p>	<p>The proposed subsection streamlines the deregistration process of CMOs, especially if the CMO materially prejudices its members. This may also result to punishment of the CMO by KECOBO.</p> <p>To facilitate effective decision-making with sufficient facts at hand, we recommend the inclusion of a proviso permitting the CMO's members to also make submissions in relation to such an investigation. This is because they are the primary stakeholders in this process and stand to be significantly affected by any decision made by KECOBO.</p>
Copyright (Act, No.12 of 2001	<p>Section 46(9) of the Copyright Act to be amended as follows:</p> <p>46(9) The Board may by notice in the Gazette <u>and in a daily newspaper of national circulation</u> de-register a collecting society if....</p>	<p>The membership of CMOs may be spread considerably over the country, and inasmuch as the Kenya Gazette is presumed to be a notice to the public in general, it would be ideal to communicate such deregistration effectively to all the stakeholders. Publication through a daily newspaper would achieve this effectively.</p>
Copyright (Amendment) Bill, 2017	<p>Section 46D(6)(b) proposed to be introduced to the Copyright Act, 2001 through Clause 25 of the Bill be amended as follows:</p> <p>25(6) The powers conferred by subsection (1) may be exercised in the following circumstances-</p> <p>46 D(6)(b) failure by an organization to account for monies to <u>at least five percent</u> of its members.</p>	<p>The proposed powers referred to under subsection (1) is that of the Executive Director of KECOBO to order an inspection into a CMO, its book of accounts and records.</p> <p>As presently Billed, the Bill proposes that such investigation can be triggered by failure to account to "a significant number" of members. This is too ambiguous and could provide space avoiding investigation. Instead, an ascertainable</p>

Applicable Statute	Proposed Amendment	Reasons and Justifications
Copyright (Amendment) Bill, 2017	<p>Section 46D (g) proposed to be introduced to the Copyright Act, 2001 through Clause 25 of the Bill be amended as follows –</p> <p>25(6) The powers conferred by subsection (1) may be exercised in the following circumstances-</p> <p>46 D (g) where an organization has failed to comply with requests for information or records, <u>either from the Board or from its members.</u></p>	<p>proportion of thirty percent (30%) is suggested.</p> <p>The proposed section refers to KECOBO's Executive Director having the power to order an investigation into a CMO's affairs. As presently Billed, the proposed section does not specify from whom information requests will come from.</p> <p>Our proposed amendment seeks to clarify that such information requests could come both from KECOBO and CMO's members.</p>
Copyright (Amendment) Bill, 2017	<p>Section 46G proposed to be introduced to the Copyright Act, 2001 through Clause 25 of the Bill be amended as follows:</p> <p>46G The agenda and the minutes of all committee and full Board of Directors meetings of an organization shall be submitted as soon as the meetings are over and a representative of the Board <u>shall</u> attend Board of Directors meetings of an organization to advise where matters affecting member's interests are being discussed.</p>	<p>The proposed section 46G seeks to increase KECOBO's oversight over decision-making by CMO's. This is to safeguard the interests of CMO members.</p> <p>To ensure this, we propose that attendance of Board of Directors meetings by KECOBO be a mandatory rather than discretionary requirement. This can further be achieved by the 'secondment' or embedding of a KECOBO official within the CMO to ensure continuity of monitoring and awareness of the general affairs of the CMO's membership. This may not be achieved through occasional attendance.</p>
Copyright (Amendment) Bill, 2017	<p>We propose amendment of Clause 25 of the Bill by inserting section 46H immediately after the proposed new section 46G as follows:</p> <p>46H (1) The Executive Director of the Board may, if he considers it reasonable in the circumstances, authorise a collective management organization to operate an extended collective management scheme after receiving an application made under this Act.</p> <p>(2) The authorisation must specify-</p>	<p>The proposed introduction of "extended copyright management" is an emerging global practice that blends the freedom of association of right-holders and the benefits of collective management of copyright. Its basis is that upon satisfaction of KECOBO that the CMO represents a substantial number of right-holders in that category of works, then the CMO's authority shall be extended to include all other right-holders of that category in the country. Thus, the CMO will be mandated to collect and distribute</p>

Applicable Statute	Proposed Amendment	Reasons and Justifications
	<p>(i) The types of relevant work it applies to; and</p> <p>(ii) The permitted use.</p> <p>(3) The Executive Director of the Board shall only grant an authorisation under subsection (1) if he is satisfied that –</p> <p>(i) at the time of the authorisation, the relevant collective management organization licenses by way of collective licence relevant works of the type which are to be the subject of the proposed extended collective management scheme;</p> <p>(ii) the relevant collective management organization's representation in the type of relevant works which are to be the subject of the proposed extended collective management scheme is significant;</p> <p>(iii) the code of practice of the relevant collective management organization is consistent with the specified criteria including the criteria concerning the protection of non-member right holders;</p> <p>(iv) the opt out arrangements, including those for multiple works, are adequate to protect the interests of right holders;</p> <p>(v) the arrangements for publicising the scheme, for contacting non-member right holders in order to distribute the net management fees and for distributing any net management fees which remain undistributed are appropriate for the proposed scheme, having regard to the interests of non-member right holders; and</p>	<p>royalties for both its members and non-members.</p> <p>To respect right-holders' freedom of association, non-members shall be free to opt out of this extended arrangement. This, then will be in keeping with the decision in <i>Mercy Munee & Another v Safaricom Limited and 3 Others</i>, Petition 5 of 2016. Theoretically, if effectively managed the benefits of the extended collective licensing will militate against a large scale opting out by non-members.</p> <p>It would be necessary to further outline the details of such a system through regulations.</p> <p>The best practices regarding such extended schemes can be borrowed from the experience of Nordic countries such as Norway, Denmark and Sweden as well as its recent adoption in the United Kingdom.</p>

Applicable Statute	Proposed Amendment	Reasons and Justifications
	<p>(vi) the relevant collective management organization has obtained the required consent to the proposed extended collective management scheme.</p>	
<p>Copyright Act, No 12 of 2001</p>	<p>We propose amendment of the Copyright Act by inserting a new section 48A immediately after section 48 as follows:</p> <p>(1) A large-scale commercial user of works eligible for copyright shall utilise a digital rights management system to record and provide verifiable and accountable data on the exploitation of such works.</p> <p>(2) A digital rights management system shall record details reasonably necessary to identify the work, the right-holder and the quantum of exploitation including:</p> <ul style="list-style-type: none"> (i) The right-holder's name; (ii) The name of the work; (iii) The electronic identifier of the work; and (iv) The amount or duration of exploitation such as airplay or number of views. <p>(3) Any organization licensed by the Board under section 46 of this Act and any other contractual licensee of works eligible for copyright shall rely on the data from the digital rights management system to ascertain royalty distribution to individual right-holders.</p> <p>(4) A right-holder shall be entitled to a certified copy of the data records from the digital rights management system for the relevant period upon distribution of royalties under subsection 3 or upon demand.</p>	<p>We propose that a statutory obligation to maintain a digital rights management system (DRMS be imposed on large-scale commercial users of copyrighted works). A DRMS shall provide verifiable and accountable data on the exploitation of specific works by the said user. The proposed provision provides the minimum standards for such a DRMS but is not too stringent as to constrain the freedom of stakeholders to make their own functional and technical choice of system.</p> <p>It will be necessary under section 2 to define "large-scale commercial users" within this context, to include telecommunication service providers, CSPs, PRSPs, media companies (both radio and television) and online music streaming services.</p> <p>Further, it is suggested that CMOs and other related parties (such as content service providers and premium rate subscription providers) be obligated to rely on DRMS data to ascertain royalty distribution to right-holder. This ought to reduce disputed figures on airplay and exploitation of works.</p> <p>KECOBO's audit powers over such a system shall also ensure its accountability, whereas the proposed penalties ought to serve as sufficient deterrent to tampering.</p>

Applicable Statute	Proposed Amendment	Reasons and Justifications
	<p>(5) The Board shall conduct an audit annually over:</p> <ul style="list-style-type: none"> (i) any installed digital right management system; and (ii) datasheets derived from any installed digital rights management system. <p>(6) Any person who maliciously tampers with an installed digital rights management system or fraudulently misrepresents the data derived therefrom shall be guilty of an offence and upon conviction shall be liable to a fine not exceeding five hundred thousand shillings, or to imprisonment to a term not exceeding four years, or both.</p>	
Copyright Act, No.12 of 2001	<p>The Copyright Act be amended by inserting a new section 46I as follows:</p> <p>46 I (1) A right holder shall not be precluded from entering separate, legally binding arrangements as to the management of their work with third parties of their choice by virtue of being a member of a collective management organization.</p> <p>(2) A right holder shall, upon applying for membership in a collective management society and from time to time thereafter, specify which works shall be under the exclusive management of the collective management organization.</p>	<p>We propose that right-holders should expressly be granted the ability to choose which amongst their works they would prefer to be administered by a CMO. Thus, a right-holder could cherry-pick a number of works out of their portfolio that they prefer to administer privately or independently. This grants a right-holder sufficient flexibility where they would like to handle royalty collection for, say a hit song, while their more averagely-performing works would be within the CMO's control.</p>
Copyright Act, No. 12 of 2001	<p>We propose the Copyright Act, 2001 be amended by inserting the following section 46J immediately after section 46I as follows:</p> <p>46J (1) Every right holder intending to become a member of a collective management organization shall execute an agreement to that effect in writing.</p>	<p>We propose that it should be a mandatory requirement for all CMO memberships to be based on written contracts between individual rights holders and the respective CMOs.</p> <p>These written contracts should have certain irreducible minimum standards on the rights and obligations of each of the parties therein, as provided for under the</p>

Applicable Statute	Proposed Amendment	Reasons and Justifications
	<p>(2) Every agreement executed in accordance with subsection (1) shall explain the terms and conditions of membership of the organisation, including-</p> <ul style="list-style-type: none"> (i) The duration of membership; (ii) A member's right to vote at meetings, scrutinise the organization's books of accounts and to demand an account of royalties received; and (iii) The works included or excluded from the organization's management. <p>(3) In any event that an agreement executed under subsection (1) is silent on the rights of either the collective management organization or a member thereof, the provisions of the Schedule shall be deemed to have been adopted.</p>	<p>Copyright Act. These would include for example right to scrutinise books of accounts, to vote at meetings, to demand an account of royalties received and disbursements thereof and more. To create uniformity, it is suggested that a model contract be Billed and inserted as a schedule to the Copyright Act.</p>

We trust that you will find the above proposed amendments helpful. Should you require any clarification or in case of any further questions please do not hesitate to contact us.

MMC AFRICA LAW

MOSES SUYWA WECHÉ,
P.O. BOX 397,
KHWISERO.
2 MARCH 2018

THE HONOURABLE ADEN DUALE, EGH,
LEADER OF MAJORITY,
NATIONAL ASSEMBLY,
PARLIAMENT ROAD,
NAIROBI.

Dear sir,

RE: OPPOSITION TO THE COPYRIGHT (AMENDMENT) BILL, 2017

Allow me sir, to register my opposition to the enactment of Sections 30B, 33(3A) and 33A amendments introduced via the Copyright (Amendment) Bill, 2017.

The amendments will take away our rights as artists to have a say as to who with contract with in respect of our artistic works and vest so much powers in the Board. I am aware that the High Court and Court of Appeal struck out of the Copyright Act, similar provisions before.

I urge you to remove Sections 30B, 33(3A) and 33A from the Copyright (Amendment) Bill, 2017.

Yours sincerely,



MOSES SUYWA WECHÉ

CC:- CLERK OF THE NATIONAL ASSEMBLY,
PARLIAMENT ROAD,
NAIROBI.

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CORRNELIOUS OMWITAKHO NETIA,
SANDUKU LA POSTA 114,
BUTERE.
2 MACHI 2018

ADEN DUALE, EGH,
KIONGOZI WA WAJUMBE WENGI,
BUNGE LA TAIFA YA KENYA,
NAIROBI.

Kwa mheshimiwa,

RE: MAOMBI KUHUSU COPYRIGHT (AMENDMENT) BILL, 2017

Mimi nimeona hii sharia ambayo iko hapo juu. Hasaa vipengele 30B, 33(3A) na 33A ya Copyright (Amendment) Bill, 2017.

Vipengele hivyo vitaleta hujuma kwa wana muziki wa Kenya. Ninakuomba uondoe hivyo vipengele (30B, 33(3A) na 33A) vyote kutoka kwa Copyright (Amendment) Bill, 2017.

Mimi Wako,



CORRNELIOUS OMWITAKHO NETIA

CC:- CLERK,
BUNGE,

NAIROBI.



503

ANDREW OPWOKO MUMIA,
P.O. BOX 3813-00100,
NAIROBI.
12 MARCH 2018

THE HONOURABLE ADEN DUALE, EGH,
LEADER OF MAJORITY,
NATIONAL ASSEMBLY,
PARLIAMENT ROAD,
NAIROBI.

Dear sir,

RE: THE COPYRIGHT (AMENDMENT) BILL, 2017

I salute you this day and thank you for doing a great job since getting into office.

I am a budding musician and generally a person with interest in music. I have read the above bill and noted the following:-

- a) Proposed Section 30B seeks to make collection of royalties compulsorily collectable by KRA and other bodies as may be designated by the Board;

I hereby Petition your office to delete this proposed amendment for the reason that:-

- i) The Constitutional Court in Malindi High Court PET.NO. 5 of 2016 declared compulsory collections by Collective Management Organizations (CMOs) or other designated organizations as being restrictive to artists' rights and therefore unconstitutional. The Court struck out Section 30A of the Copyright Act. **Annexed hereto is a copy of the order marked AOM1 dated 3 November 2016;**
- ii) The Constitutional Court in Malindi High Court PET.NO. 5 of 2016 gave a further interpretation and reiterated that artists had the freedom to choose who collects their royalties.
- iii) The CMOs filed an appeal in Court of Appeal Civil Appeal No.9 of 2017, **Performers Rights Society of Kenya and another Vs. Mercy Kingoo and 7 others.** They eventually withdrew the appeal after they realized that the law as interpreted by the High Court was beyond challenge. **Annexed hereto is a copy of the order marked AOM3 dated 17 October 2017;**
- iv) The Proposed introduction of Section 30B of the Copyright Act amendment Bill will reintroduce Section 30A as struck out. **Annexed hereto is a copy of the court's full judgment Court in Malindi High Court PET.NO. 5 of 2016;**
- v) This is therefore to beseech you to remove the said Section 30B from the Copyright Amendment Bill 2017 as the same seeks to force artists to collect their royalties through CMOs and or KRA.

*1. D/Committee
This is for ELO ICT
Committee which is currently
possessed of ELO Copyright Bill*

*2. Ella Kendra
Bring to the attention of the
committee for consideration
14/3/18*

**NATIONAL ASSEMBLY
RECEIVED**
14 MAR 2018
SENIOR DEPUTY CLERK
LEGISLATIVE COMMITTEES
P.O. BOX 3813-00100, NAIROBI

RECEIVED
14 MAR 2018
CLERK'S OFFICE



- vi) KRA has no mandate to collect revenue for private individuals. Its mandate is to collect revenue for the government. By asking KRA to collect revenue for private individuals, it is unconstitutional.
- b) Amendment to Section 33 (3A) of Copyright Amendment Bill by invalidating assignments that are not lodged at Board takes away from artists powers to contract, from the artist. This amendment is joined to the proposed introduction of Section 33A by the same Bill. It is my opinion that the entire proposed amendment be expunged.
- c) **CONCLUSION**
- l) Sections 30B, 33(3A) and 33A amendments introduced via the Copyright (Amendment) Bill, 2017 should be expunged from the Copyright (Amendment) Bill 2017.

Yours sincerely,



ANDREW OPWOKO MUMIA

CC:- CLERK OF THE NATIONAL ASSEMBLY,
PARLIAMENT ROAD,
NAIROBI.





REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CONSTITUTIONAL PETITION NO. 5 OF 2016

**IN THE MATTER OF ARTICLES 3, 10, 22 (10, 23 (1), 36, 40, 118, 165 AND 260 OF THE
CONSTITUTION OF KENYA, 2010**

AND

IN THE MATTER OF COPYRIGHT ACT CAP 130

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF FUNDAMENTAL
FREEDOMS) PRACTICE RULES, 2013**

BETWEEN

MERCY MUNEE KINGOO.....1ST PETITIONER

LYDIA NYIVA KINGAI.....2ND PETITIONER

VERSUS

SAFARICOM LIMITED.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

JUDGEMENT

Introduction

The petitioners are composers, producers and performing artists of musical and audio-visual works. They contracted Premium Rate Service Providers (PRSPs) to digitize their musical work and download in the 1st respondent's Skiza Tunes Portal. The 1st respondent has been paying royalties to the petitioners and other artists through their contracted PRSPs since 2008. In December, 2012 parliament passed the Statute Law (Miscellaneous Amendments) Act which introduced section 30A into the Copyright Act Cap 130. From 2015 the 1st respondent started to remit the royalties through collective management organizations (CMOs) which are not contracted by the petitioners. The 1st respondent, a private limited liability company, maintains that the decision to change the payment procedure is due to



the provisions of section 30A of the Copyright Act. The 2nd respondent is the Attorney General of the Republic of Kenya and he is being sued in his capacity as the Principal Legal Advisor to the Government.

The 1st and 2nd interested parties applied to be enjoined in this matter and they support the petitioners. The 2nd and 3rd interested parties also applied to be enjoined in the petition as parties. Their interest was to have their royalties that was being held by the 1st respondent to be released.

The Petitioner's Case

The petition is dated 21.3.2016. It seeks the following orders: -

- a) A permanent injunction restraining the 1st respondent from remitting artists' royalties from the Skiza Tunes Portal to CMOs;***
- b) A declaration that the August 2015 Agreement between the 1st respondent and CMOs was irregularly and unlawfully obtained due to lack of public participation;***
- c) A declaration that the August 2015 Agreement between the 1st respondent and CMOs was irregularly and unlawfully obtained as it infringes on the petitioners and other artists' constitutional rights;***
- d) A declaration that the Statute Law Miscellaneous Amendment Act of 2012, that introduced Section 30A of the Copyright Act, Cap. 130 was irregularly and unlawful enacted for want of public participation and therefore unconstitutional;***
- e) Costs of this petition; and***
- f) Any other relief that the court may deem for to grant.***

The petition is supported by the affidavit of the 1st petitioner. It is the petitioner's case that they are artist who engage in music. They have composed several songs. They appointed a duly licensed Premium Rate Service Provider (PRSP) to digitize and manage the music content. The 1st respondent has since 2008 operated a portal called Skiza Tune which is used to download the digital music content by its subscribers. The music works are normally uploaded in form of caller ring back tones (CRBTs) through the Skiza Tune Portal. The 1st petitioner has composed songs such as Dhoruba, Nakungoja, Ebenezer and Nimekubali on the Skiza Tunes Portal. The 2nd petitioner on her part has composed such songs as Munga Wa Ajabu, One Thing, Hadi Lini, Baba Naja and Iko Jibu on the Skiza tunes Portal.

It is the petitioner's case that they entered into agreements with PRSPs on how artists' respective exclusive rights in their music works have to be handled and how royalties have to be paid. They have contracted Liberty Africa Technologies Limited, a PRSP provider, to manage their exclusive composition, performance, production and related artistic rights and have received royalties on their behalf. Thereafter the royalties have been forwarded to them. Since 2008 the petitioners have had no complaint against the 1st respondent or their PRSP provider until August 2015 when the 1st respondent without consulting them signed an agreement with third parties namely the Music Copyright Society of Kenya limited (MCSK) and other entities that have styled themselves as Collective Management Organizations (CMOs) whereby the 1st respondent purports to bind itself to henceforth channel artists' royalties through the CMOs.



The petitioners maintain that the music Copyright Society of Kenya was deregistered in 2011. The 1st respondent breached the petitioners' constitutionally guaranteed intellectual property rights. The 1st respondent failed to engage artists in the control and distribution of the royalties in form of public participation and this is a breach of constitutional national values and principals. The petitioners are not members of CMOs and do not intend to join any one of them. The caller ring back tones are in the category of the performance rights for which the CMOs are not allowed to handle. The 1st respondent's decision to channel the royalties through CMOs is ill motivated and is intended to cause a breach of contract between the artists and their contracted PRSPs. The CMOs are ill equipped to deal with digital contents and are not licensed under the Kenya Information Communication Act Cap 411A to handle digital contents such as the Skiza Tunes contents. The 1st respondent's act of entering into an agreement with third parties is forcing the artists to become members of the CMOs and is a violation of their rights provided under Article 36 of the Constitution. Their rights risk being infringed as a result of the implementation of the agreement between the 1st respondent and third parties.

It is contended that the 1st respondent purports to be enforcing section 30A of the Copyright Act Cap 30 of the laws of Kenya and allied amendments brought in through Statute Law (Miscellaneous Amendments) Act, of 2012. The said amendment was not subjected to public participation in total contravention of Article 118 of the Constitution. Stakeholders' views especially those of the artists were not sought before the amendments introducing section 30A were enacted. According to the petitioners, unless section 30A of the Copyright Act is struck down, its continued use and implementation will continue perpetuating infringement of artists' constitutional rights to their intellectual property rights. The affidavit of Mercy Munee King'oo explains the petitioner's case in those terms. It is upon that basis that the petitioners are seeking the orders stated herein above.

Miss Ruto, counsel for the petitioners relies on the case of **ROBERT N. GAKURU & OTHERS V GOVERNOR KIAMBU COUNTY & 3 OTHERS [2014] eKLR**. The court held that public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the constitutional dictates. Counsel also maintain that the petitioners have their duly licensed Premium Rate Service Providers. They have signed agreements with PRSPs on how their respective exclusive right in their musical works have to be handled and how royalties are to be paid. Since 2008 their royalties have been paid through the PRSPs.

The 1st and 2nd Interested Parties' Case

The two interested parties filed an application dated 7.4.2016 seeking to be enjoined as parties to this suit. Their request was granted. They filed two affidavits in support of the petition. Their counsel Mrs. Kipsang filed her written submissions in support of the petition. The interested parties maintain that there was no public participation in the enactment of section 30A of Cap 130 through the Statute Law (Miscellaneous Amendments) Act, 2012. Article 10 of the Constitution recognizes national values one of which is public participation when legislation is being enacted. Article 27 of the Constitution provides for equal treatment of all persons and that every person is equal before the law. Article 35 provides for the rights to access information while Article 118 emphasizes on public participation in the legislative process.

According to the two interested parties, public participation is at the core of the legislative process with a mandatory requirement that stakeholders and interest groups be involved where substantive contents of the proposed legislation are debated. Counsel for the two parties rely on the case of **ROBERT GAKURU AND OTHERS VERSUS GOVERNOR KIAMBU COUNTY AND 3 OTHERS [2014] eKLR** where the court stated as follows:-



“That public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilling constitutional dictates...”

The statute law miscellaneous amendment Act, 2012 was presented before parliament for the first reading on 19.12.2012 and proceeded for its second reading on the same day. The third reading was done on 21.12.2012. The law was assented to on 31.12.2012. The Act contain several amendments and was passed within such a short time. The petitioners have therefore established a prima facie case that there was no public participation in effecting the amendments to section 30A of the Copyright Act. Counsel maintains that the dispute herein is not res judicata since Nairobi High Court Petition No. 317 of 2015 only dealt with the issue of the constitutionality of the effects of section 30A but the legality of the process was not considered. The issue of public participation was not dealt with in the Nairobi petition. Further, the learned judge relied upon the decision of a Canadian case which has since the delivery of judgement in Petition No. 317 of 2015 been overturned on appeal.

The 1st Respondent's Case

Ms Muriu, Mungai & Co. Advocates appeared for the 1st respondent. A replying affidavit sworn by Daniel Ndaba on 7.9.2016 was relied upon. According to the 1st respondent it is the registered proprietor of Skiza Tunes platform. This is a platform that enables telephone end users to select and download ring back tones to their phones. The ring back tone is personalized by the recipient of a call so that all his callers will hear the ring tone instead of the standard ring tone bought with the phone. The 1st respondent entered into an agreement with the Kenya Association of Music Producers (KAMP), Performance Rights Society of Kenya (PRISK) and the Music Copyright Society of Kenya (MCSK) who are all CMOs licensed under section 46 of the Copyright Act by the Kenya Copyright Board (KECOBO) to collect license fees and distribute royalties in the respective categories in which they are licensed.

It is the 1st respondent's case that the agreement it signed with the three CMOs is in line with the requirement of section 30 A of the Copyright Act which requires that rights users pay a single equitable remuneration to performers and producers of sound recordings offered to the public. The section is mandatory and all payments have to be made to the CMOs and no one else. The petition herein is res judicata as the issues being raised were determined in **Nairobi High Court Constitutional Petition number 317 of 2015; XPEDIA MANAGEMENT LIMITED & 4 OTHERS V ATTORNEY GENERAL & 5 OTHERS [2016] eKLR.**

To the 1st respondent the petition raises three issues to be determined by the court, namely whether the petition is res judicata, whether there was lack of public participation in the enactment of the Statute Law (Miscellaneous Amendments) Act, 2012 and whether section 30A of the Copyright Act violates the petitioners' rights under Article 36 and 40 of the Constitution. Lastly, whether the reliefs sought should be granted.

On the issue of res judicata it is stated that the petition is res judicata. section 7 of the civil procedure act provides as follows: -

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

In the case of **THERESA COSTABIR V ALKA ROSHANLAL HARBANSLAL SHARMA & ANOTHER**



[2015] eKLR the Court of Appeal expounded on section 7 of the Civil Procedure Act in the following words: -

“... section 7 aforesaid raise four pre-requisites to be met for a matter to be deemed res judicata. These were defined in the case of Uhuru Highway Development Limited v Central Bank of Kenya & 2 others [1996] eKLR to mean that there has to be:

- 1. A previous suit in which the same matter was in issue*
- 2. The parties are the same or litigating under the same title*
- 3. A competent court heard the matter in issue and determined*
- 4. The issue has been raised once again in a fresh suit.”*

According to the 1st respondent the petitioners have conceded that they contracted Liberty Africa Technologies in the management of their artistic rights as indicated in their petition and supporting affidavit. Liberty Africa Technologies Ltd was the 2nd petitioner in Nairobi Petition No. 317 of 2015. It brought the suit on its own behalf and on behalf of 5,000 of its members. The court delivered its judgment on 11.5.2016 and held that section 30A of the Copyright Act is constitutional. No appeal has been filed against that decision. Therefore, Liberty Africa represented the interests of the petitioners in the Nairobi suit. Counsels rely on the case of **JOHN NJUE NYAGA V ATTORNEY GENERAL & 6 OTHERS (2016) eKLR**. The court had the following to say on res judicata: -

“... makes conclusive a final judgement between the same parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit. Further that “a person does not have to be formally enjoined in a suit, but he will be deemed to claim under the person litigating on the basis of a common interest in the subject matter of the suit”

It is further contended that the petitioners herein were aware of the Nairobi petition and could have applied to be enjoined in the Nairobi petition. Liberty Africa argued that section 30A of the Copyright Act was unconstitutional and opposed its application in the payout of royalties to CMOs. The current petitioners also think that the section is unconstitutional. The issues are substantially the same as they relate to section 30A of the Copyright Act. Reference is made to the case of **JOHN FLORENCE MARITIME KSERVICES LTD & ANOTHER V CABINET SECRETAY FOR TRANSPORT AND INFRASTRUCTURE & 3 OTHERS [2015] eKLR** where the court stated as follows: -

“Res judicata based on a cause of action, arises where the cause of action in the latter proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. Cause of action res judicata extends to a point which might have been made but was not raised and decided in the earlier proceedings. In such a case, the bar is absolute unless fraud or collusion is alleged.”

The 1st respondent submit that a law may be declared as unconstitutional if either the constitutional process was not followed or even where the process was followed, the implementation, application or effect is unconstitutional. Liberty Africa challenged the law but its petition was dismissed. The petition herein is therefore res judicata and the courts should not be called upon to dwell on issues that have already been dealt with by a similar court taking into account the fact that the courts are already clogged and overwhelmed by the number of cases pending determination.



It is submitted that the burden of proving whether there was public participation or not lies with the petitioners. This was held in the case of **SAMOW MUMIN MOHAMED & 9 OTHERS V CABINET SECRETARY, MINISTRY OF INTERIOR SECURITY AND CO-ORDINATION & 2 OTHERS [2014] eKLR** where the court stated: -

“This emerges from a long standing common law approach in respect of alleged irregularity in the acts of public bodies. Omnia praesumuntur rite et solemniter esse acta—all acts are presumed to have been done rightly and regularly. So, the petitioner must set out by raising firm and credible evidence of the public authority’s departures from the prescriptions of the law.”

The process of enacting legislation is quite clear. The bills are published before they are debated in parliament. The bills are also subjected to the committee stage where members of the public are invited to give their views. The allegations of lack of public participation are hollow. Parliament followed its standing orders and the petitioners have not proved that there was no public participation. Counsel relies on the case of **LAW SOCIETY OF KENYA V ATTORNEY GENERAL & 2 OTHERS (2013) eKLR** where it was stated that: -

“The burden of showing that there has been no public participation or that the level of public participation within the process does not meet the constitutional standards is on the petitioner.”

According to the 1st respondent there was no violation of the petitioners’ rights under Article 36 and 40 of the Constitution. The petitioners are not saying that they have been denied their royalties paid to CMOs. They have not also alleged that the CMOs have insisted on membership as a prerequisite to the payment of royalties paid to the CMOs by the 1st respondent. What section 30A has done is to illegalize the payment of royalties to any person other than CMO duly licensed by KECOBO. Section 30A does not say that only members of a CMO can receive the royalties. There has been no infringement of the petitioners’ intellectual property rights. The agreements entered between the 1st respondent and their CMOs are private between those parties and the petitioners are strangers thereto. The petition lacks merit and cannot be granted.

2nd Respondent’s Case

The 2nd respondent filed grounds of opposition on 2.8.2013. It is indicated that the petition is res judicata as a decision was made in Nairobi Petition No. 317 of 2015 (supra). The petition is therefore scandalous and an abuse of the justice system. It is also stated that the relief sought by the petitioners are in itself unconstitutional as the petitioners’ rights should not interfere with the rights of other artists who ought to enjoy the fruits of their judgment in Petition No. 317 of 2015. Section 30A of cap 130 does not contravene Article 36 of the Constitution. Parliament discharged its constitutional mandate by enacting section 30A of the Copyright Act.

Mr. Waigi Kamau, State counsel, submit that the issue for determination raised by the petition involves the constitutionality of section 30A of the Copyright Act. All the issues being raised were dealt with by the Nairobi Petition. The Nairobi High Court analysed all the challenges brought against section 30A by the petitioners in that suit and dealt with them. Mr. Waigi submit that the issues being raised have been settled. The only new issue involves public participation. Article 10 and 118 of the Constitution on Public participation were duly complied with. There is no infringement on the petitioners’ constitutional rights.

3rd and 4th Interested Parties’ Case



The two parties filed an application dated 19.4.2016 seeking to be enjoined as interested parties to this suit. This court issued interim orders which stopped the release of the royalties by the 1st respondent. The two interested parties sought to have the royalties released by the 1st respondent. They filed a replying affidavit opposing the petition sworn by Peterson Ngethah Githinji on 4.5.2016. They contend that the petitioners have not annexed their purported agreements with PRSPs or provided any proof that they have been receiving royalties from the 1st respondent. Collection and distribution of performers' royalties including those accruing on Skiza Portal Tunes is a preserve of Collecting Societies/Management Organizations as licensed by KECOBO pursuant to section 5 (b) and 46 of the Copyright Act. The interested parties aver that they are not opposed to the petitioners' contention that their royalties accruing on Skiza Portal be paid to them through PRSPs. All what they have opposed to is the petitioners' allegation that all artists whose musical works are on Skiza Portal appointed PRSPs and that they should be paid through PRSPs. Their demand on the mode of payment should be limited to them only and should not be applied to other artists.

Analysis and Determination

The petition raises the following issues: -

- i. Whether the petition is res judicata.
- ii. Whether the amendment of the Copyright Act and introduction of section 30A observed the principles of public participation or whether section 30A is unconstitutional.
- iii. Whether the reliefs sought should be granted.

Whether the Petition is res judicata

The respondents maintain that the petition is res judicata. The basis for this is that there is the judgment in Nairobi Petition Number 317 of 2015 where the issue of the constitutionality of section 30A of the Copyright Act was determined. It is further submitted that the parties in that petition are similar as the petitioners were represented by Liberty Africa Ltd.

I have had the advantage of reading the judgement of Mumbi Ngugi J in Nairobi Petition No. 317 of 2015. The issues for determination in that petition were whether the court had jurisdiction to hear the petition, whether section 30A is unconstitutional and a violation of the petitioners' rights under Articles 36, 40 and 47 and whether the 3rd, 4th and 5th respondents in that petition were exceeding their mandate under section 30A of the Copyright Act in collecting royalties from users. The court summarized its findings as follows: -

- i. Section 30A of the Copyright Act does not violate the petitioners' freedom of association. This is in light of the fact that there is no requirement for any artist to become a member of a CMO in order to receive remuneration for the use of copyrighted works.***
- ii. Section 30A of the Copyright Act does not violate the intellectual property rights of petitioners. Its only requirement is that there should be collective management organizations which collect royalties for use of copyrighted works and distribute such royalties to the copyright holders;***
- iii. No violation of article 47 of the Constitution has been demonstrated. However, KECOBO has the statutory duty to ensure that collective management organizations account to members and***



non-members whose royalties they collect, and remit such royalties to the rights holders.

Section 30A of the Copyright Act provides as follows: -

(1) If a sound recording is published for commercial purposes or a reproduction of such recording is used directly for broadcasting or other communication to the public, or is publicly performed, a single equitable remuneration for the performer and the producer of the sound recording shall be paid by the user through the respective collective management organization, and the remuneration shall be shared equally between the producer of the sound recording and the performer.

(2) If a fixation of a performance is published for commercial purposes or a reproduction of a fixation of a performance is used for broadcasting or other communication to the public, or is publicly performed, a single equitable remuneration for the performer shall be paid by the user to the collective management organization.

(3) The right of equitable remuneration under this section shall subsist from the date of publication of the sound recording or fixed performance until the end of the fiftieth calendar year following the year of publication, provided the sound recording or fixed performance is still protected under section 28 and 30.

(4) For the purposes of this section, sound recordings and fixations of performances that have been made available by wire or wireless means in such a way that members of the public may access them from a place and a time individually chosen by them shall be considered as if they have been published for commercial purposes.

The Court of Appeal in the case of **COUNTY GOVERNMENT OF NYERI & ANOTHER V CECILIA WANGECHI NDUNGU** [2015] eKLR held as follows: -

“the cardinal rule for construction of statute is that a statute should be construed according to the intention expressed in the statute itself.”

Halsbury's Laws of England 4th edition Vol 44 states the following on interpretation of statutes: -

“It is one of the linguistic canons applicable to construction of legislation that an Act is to be read as a whole, so that an enactment within it is to be treated not as standing alone but as falling to be interpreted in its context as part of the act. The essence of construction as a whole is that it enables the interpreter to perceive that a proposition in on part of the Act is by implication modified by another provision elsewhere in the Act...”

Section 7 of the Civil Procedure Act prohibits courts from hearing disputes which have already been determined by other courts. Once a pronouncement has been made on an issue, then the same should not be the subject of litigation before another court and between the same parties. The final determination in Petition No. 317 of 2015 does not make any pronouncement on the constitutionality of section 30A of the Copyright Act. The court held that the section did not violate the petitioners' rights. It can well be concluded that it was determined that section 30A is not unconstitutional. However, that determination is in relation to the parties to that petition as well as the core issue as to whether the section violates freedom of Association under Article 36 of the constitution. That issue was determined in Petition No. 317 of 2015. In the case of **ZURICH INSURANCE COMPANY PLC V COLIN RICHARD** [2011] EWCA CIV 641, the court explained the principal of res judicata in the following terms: -



“Estopple by res judicata, or estoppel by record, is a manifestation of the principle that judicial decisions once made must be accepted as final and are not open to challenge. Ultimately, it rests on a rule of policy that it is in the public interest for there to be finality in litigation, but it also sustains an important principle that decisions of competent tribunals must be accepted as providing a stable basis for future conduct. The Latin word “res judicata” mean simply “a thing judicially determined.” They may apply to the claim as a whole (usually referred to as “cause of action estoppel”), or may refer to one or more specific issues which the court was required to decide in the course of reaching its decision on the matter before it (what is generally referred to as “issue estoppel” The fact that an order is made by consent does not in my view prevent it from giving rise to an estoppel by record, provided that the nature of the order is such that it would otherwise have that effect.”

My view on the issue of estoppel is that where the dispute involves interpretation of a statutory provision which is alleged to be in contravention of the Constitution, similar cases can be brought to court but based on a different dimension. A petitioner can say that a certain provision of a statute is unconstitutional as it violates a certain Article of the Constitution. That dispute can be determined but another party is not barred from asking the same court to declare the same statutory provisions as unconstitutional as it was passed without public participation or that it violates another Article of the Constitution. In other words, res judicata cannot be applied generally in relation to interpretation of the Constitution or a statute. There is also the simple fact that one judge can declare a certain statutory provision as unconstitutional while another judge declares the same provision as constitutional. In such a case, res judicata cannot apply. A good example is the issue relating to section 40 (3) of the County Governments Act, 2012. In the case of **STEPHEN NENDELA V COUNT ASSEMBLY OF BUNGOMA & 4 OTHERS [2014] eKLR** Justice Mabeya declared that section as unconstitutional. Justice Byram Ongoya dealt with the same issue in two case namely **GEORGE MAINA KAMAU V COUNTY ASSEMBLY OF MURANGA & 2 OTHERS [2016] eKLR** and **RICHARD BWOGO BIRIR V NAROK COUNTY GOVERNMENT & 2 OTHERS [2014] e KLR**. The judge did not declare section 40 (3) of the County Governments Act as unconstitutional. I also dealt with the same issue in the case of **AMINA RASHID MASOUD V THE GOVERNOR, LAUMU COUNTY & OTHERS Malindi Constitution Petition No. 10 of 2016** and I held that section 40 (3) was not unconstitutional. All these cases were based on similar facts and involved the constitutionality of section 40 (3) of the County Governments Act. The **RICHARD BWOGO BIRIR CASE ended in the Court of Appeal (Nyeri Civil Appeal No. 74 of 2014)**. The Court of Appeal did not deal on the issue of the constitutionality of the section.

The petitioners herein were not parties to Petition No. 317 of 2015. The contention that they were represented by their Premium Rate Service Provider – Liberty Africa Technologies Ltd – cannot stand. That party litigated on the position of a Premium Rate Service Provider while the petitioners are artists. The freedom of association of the PRSPs is different from that of the artists.

I do find that the petition is not res judicata. The petitioners can challenge the provisions of Article 30A on the grounds that it was passed without public participation or that it violates their constitutional rights. They can also challenge the section on the ground that its implementation is leading to infringement of their constitutional rights.

Whether there was public participation in enacting section 30A of the Copyright Act

Section 30A was brought in through the Statute Law (Miscellaneous Amendments) Act, 2012. The 1st and 2nd interested parties submitted that the Statute Law (Miscellaneous Amendments) Act, 2012 was introduced in parliament on 19.12.2012 for the first reading. It went through the second reading on the same date and was referred to the relevant committee. It was brought back to parliament on 21.12.2012



for 3rd reading and was passed. It was assented to on 31.12.2012. the Act covered several other statutes and its preamble indicate that it is **“AN ACT OF PARLIAMENT TO MAKE MINOR AMENDMENTS TO STATUTE LAW”**. The amendments on the Copyright Act related to section 15 that was deleted, section 30 had some amendments, section 30A was introduced, sections 36 and 42 were also amended.

The petitioners contend that there was no public participation before the introduction of section 30A. It is also deponed that the stake holders were not involved. Ordinarily, a Statute Law (Miscellaneous Amendments) Act would only deal with minor amendments to certain statutes. Such amendments involve rectification of drafting mistakes or delating provisions which have been affected by other new legislation among others. There would be no need for extensive public participation if the intention is to do minor amendments as the same Act suggests.

However, where the new introductions alter the original Act to a great extent and introduces new substantive provisions that were not in place before, then such amendments ought to be subjected to public participation. Of late, parliament has made drastic amendments to old statutes through the avenue of Statute Law (Miscellaneous Amendments) Act. A case in point is the amendment of the Judicial Service Act and introduction of a requirement that three names for the position of the Chief Justice and Deputy Chief Justice be forwarded to the president for him to appoint one nominee for each respective position in place of the original position which required that only one name be forwarded by the JSC. The amendments were done through the Statute Law (Miscellaneous Amendments) Act, 2015.

The same Act introduced drastic changes to the Employment and Labour Relations Act, the Environment and Land Court Act, the High Court (Organization and Management) Act and the Magistrates' Court Act. There could be some form of public participation while passing the Statute Law (Miscellaneous Amendments) Acts but a great deal of consultation is required.

The issue of public participation has been litigated upon in several forums. Unfortunately for this case, the report of the relevant parliamentary committee was not brought to the attention of the court for it to know what transpired when the bill was referred to the committee. We can make presumption that the committee called for memorandums and comments in relation to the proposed amendments on all the affected statutes. Article 10 (2) (a) on National Values and Principles of Governance calls for participation of the Kenyans in all spheres of life. Similarly, Article 118 calls for parliament to conduct its business and the business of its committees in an open manner and facilitate public participation.

In the case, of **LAW SOCIETY OF KENYA V ATTORNEY GENERAL AND THE NATIONAL ASSEMBLY (2016) eKLR**, the court had this to say on public participation: -

“... the law is not that all persons must express their views or that they must be heard or that the hearing must be oral. Similarly, the law does not require the proposed legislations be brought to each and e very person wherever that person might be. What is required is that reasonable steps be taken to facilitate the said participation....”

It is not expected that all Kenyans will participate in the enactment of legislation. Indeed, our representative democracy whereby each constituency elects a member of parliament each year to represent the residents of a particular constituency implies that Kenyans are fully represented in the legislative process. However, by enacting the 2010 Constitution, Kenyans still felt that they should be engaged once again when parliament is conducting its affairs. That is why Article 118 was placed in the Constitution. Such Article calls for engagement with the stakeholders of each particular sector affected by a specific legislation whenever such legislation is amended or where a new legislation is enacted. The stakeholders affected by the Copyright Act includes all Kenyans generally and in particular the



producers, performers, artists, mobile phone operators, broadcasting corporations among others. There is no evidence that the stakeholders were engaged before the introduction of section 30A of the Copyright Act. The section is not a minor Amendment. Indeed, if the contentions of the 1st and 2nd interested parties on the timelines taken to pass the bill it will be noted that there was no time for public participation. The committee only had three days from 19.12.2012 to 21.12.2012 to present the bill back to parliament. That period was not sufficient to engage the stakeholders.

The use of collective management organizations to receive royalties seems to be the core issue which led to the dispute. Prior to this, the petitioners had contracted a Premium Rate Service Provider to manage their affairs including the collection and disbursements of the royalties. The position prior to the enactment of section 30A seems to be that each artist was represented by a Premium Service Rate Provider. These providers were not licensed as CMOs. Section 5 of the Copyright Act provides for functions of the Kenya Copyright Board, KCOBO. One of its functions under section 6 (b) is to license and supervise the activities of Collective Management Societies as provided for under the Act. Section 46 (5) of the Act states as follows.

“The Board shall not approve another collecting society in respect of the same class of rights and category of works if there exists another collecting society that has been licensed and functions to the satisfaction of its members.”

It is clear that only one collecting society can be licensed in respect of the same class of rights or category of works. Section 30 (3) recognizes a performer's right to enter into a binding authorization and appoint a representative. Section 30A calls for payment to producers and performers of the single equitable remuneration through the respective Collective Management Organizations and the remuneration shall be paid by the user to the CMO. The remuneration shall be shared equally between the producer of the sound recording and the performer.

On the issue of public participation before the introduction of section 30A, it is my finding that there was no public participation. The stakeholders were not engaged. The section does not introduce minor amendments to the Act and ought to have been subjected to public participation. The assumption was that the amendments on the affected statutes were minor. However, drastic changes were made to the Copyright Act.

I do reiterate that the dispute herein relate to the point of payment for royalties earned by the artists and other produces through the Skiza Tunes. According to the petitioners, they are satisfied with their current arrangement with the Premium Rate Service Providers (PRSPs) who are licensed by the Communication Authority of Kenya. They were not involved in the change of paying point from the PRSPs to the Collective Management Organizations (CMOs). I do agree with the findings of Justice Mumbi Ngugi that there is no requirement for any artist to become a member of a CMO in order to receive remuneration for the use of copyright works. Section 30A does not make it mandatory for the 1st respondent to channel the royalties only through the CMOs. The argument that it would be difficult to deal with each individual artist is not tenable as the 1st respondent has been paying dividends to its shareholders through their mobile phones. Further, the 1st respondent has over twenty million subscribers and is able to manage all their affairs which are not limited to phone calls but include m-pesa transactions, purchase of bundles, accumulation of points through the use of phones, use of internet and crediting airtime. The 1st respondent's technology is quite advanced and has been of great service to Kenya. Between 2013 and 2015, the 1st respondent has been paying the royalties through the PRSPs and has not been charged in court for violating the law.

I do not agree with the position taken by the 1st respondent that all the royalties have to be paid through



the CMOs. The 1st respondent was a party in Nairobi Petition Number 317 of 2015. The court held that it is not mandatory for the artists and producers to be members of the CMOs for them to receive their remuneration for the use of their copyright works. The effect of that is that the CMOs can only pay those registered with them. Since the PRSPs are also legally licensed, they can still continue to receive the royalties of those artists who are contracted with them. PRSPs are not amorphous or illegal organizations. Section 30A of the Copyright Act does not illegalize payment of royalties to any person other than CMOs. If that is the case, then the section would be violating the petitioners' right of freedom of association as well as freedom not to be compelled to join any kind of association. If all royalties are to be paid through CMOs, the effect would be that an artist cannot receive his/her royalties until he/she joins one of the three CMOs. The dispute is about payment point and each artist should be at liberty to be paid through the point of his choice. Receiving royalties for an artist who is not your member is unconstitutional. It is therefore clear to me that the manner in which section 30A of the Copyright Act is implemented is unconstitutional. Artists who already have existing contracts with their Premium Rate Service Providers are being called upon to abandon those agreements and join any one of the three Collective Management Organizations. The right to choose where one's royalties are to be paid is being infringed. The 1st respondent, safaricom, insists that section 30A did illegalize payment of royalties to other organizations not registered as CMOs. During the pending of the suit, over Kshs.200 million due to artists was being held as the 1st respondent insisted on releasing the money through the CMOs.

The petitioners are seeking orders of injunction among other prayers. They contend that they are being forced to get their royalties through the CMOs yet they have existing contracts with their PRSPs. Since 2008 upto 2015, they were receiving their royalties through their duly contracted PRSPs. It is clear from the stand taken by the 1st respondent that the petitioners will not get their royalties until the same is paid through the CMOs. It is not clear to me whether any fees or charges are levied by the CMOs. Although they are described as non-profit making organizations, that does not mean that they are charitable institutions. They are private bodies. What would be the need of them receiving the royalties and thereafter passing the payment over to the artists without any fee. If that is the case, which I find is not, then the royalties ought to be paid directly to the artists without any involvement of the CMOs.

I am satisfied that the petitioners have established a prima facie case. They were not consulted when section 30A of the Copyright Act was passed. Their pre-existing contracts are being trampled upon. It is evident that the 1st respondent is not the only user of the petitioners' works. There are other mobile phone operators. There are also television and radio stations who could be using the petitioners' works. Some of the users may not be using the digitized ring tones but by the end of the day royalties have to be paid. I believe those royalties are not paid through the three CMOs.

I do find and hold that the petitioners' rights to associate with their PRSPs are being infringed. The petitioners are involved in an industry which involves the youths as well as well established artists. It takes time, money and hard work to produce the artistic works. The law should not way-lay the artists at the very end of the process and order them to receive their royalties through three Collective Management Organizations. What is so special with these three organizations" Such an arrangement is tantamount to obstructing an employee or anyone not to get his salary or payment through any other bank other than the one preferred by the employer or paying body. This is unconstitutional. The 2010 Kenyan Constitution has pumped fresh air and freedom into the Kenyan society. No Kenyan should have his options of how he would like his payments to be made after his/her hard work limited to a specific paying point. This amounts to tethering one's freedom of association and right to choose where to be paid and limiting such fundamental rights and freedoms to only three CMOs is unconstitutional. That cannot be allowed in a democracy like ours based on equality, human dignity and the rule of law.

In the end, I do find that to the extent that section 30A of the Copyright Act, Cap 130 Laws of Kenya



limits the artists' right to choose how their royalties are to be paid, that section is unconstitutional as its effect is to limit the petitioners' freedom of association. Further, taking into account the fact that section 30A of the Copyright Act was enacted without public participation and its effect is to be applied retrospectively without regard to existing arrangements between artists and their contracted Premium Rate Service Providers, that section is unconstitutional.

The 1st respondent entered into an agreement in 2015 with the three CMOs whose effect is to channel their royalties through those CMOs. The 1st respondent's position is that the agreement is a private arrangement and the petitioners are strangers to it yet at the same time contends that section 30A illegalizes payments to other institutions other than the three CMOs. Such arrangement is unconstitutional as it indirectly bind third parties who are not privy to the contract.

The upshot is that the petition dated 21.3.2016 is merited as is hereby granted as prayed. The manner in which section 30A is implemented is unconstitutional. An injunction shall issue in terms of prayers (a) of the petition. Section 30A of the Copyright Act is unconstitutional as it was enacted without public participation and it is being retrospectively applied. It also limits artists' freedom not to be compelled to join an association of any kind as provided under Article 36 of the Constitution. The petitioners are being forced to receive their royalties through Collective Management Organization yet they have no dealings with them. This is unconstitutional.

It is hereby declared that the august 2015 agreement between the 1st respondent and the CMOs is irregular, unlawful and infringes on the petitioners' constitutional rights.

Each party shall meet their own costs.

Dated and delivered in Malindi this 3rd November, 2016.

S.J. CHITEMBWE

JUDGE



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REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
CONSTITUTIONAL PETITION NO.5 OF 2016

IN THE MATTER OF ARTICLES 3,10,22(1),22(2),23(1),36,40,118,165 AND 260 OF THE
CONSTITUTION OF KENYA,2010

AND

IN THE MATTER OF COPYRIGHT ACT CAP 130

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF FUNDAMENTAL
FREEDOMS) PRACTISE AND PROCEDURE RULES,2013

BETWEEN

MERCY MUNEE KINGOO..... 1ST PETITIONER

LYDIA NYIVA KINGAL..... 2ND PETITIONER

VERSUS

SAFARICOM LIMITED..... 1ST RESPONDENT

ATTORNEY GENERAL..... 2ND RESPONDENT

AND

ANNA BALUKA KISEKO..... 1ST INTERESTED PARTY

CHRISTINA MARGARET DANIEL..... 2ND INTERESTED PARTY

ORDER

(Being Judgement delivered in Open Court on the 3rd November,2016 before Hon.Justice S.J.Chitembwe)

This matter coming up for Judgement on 3rd November,2016 before HON.JUSTICE S.J. CHITEMBWE and in the presence of Miss Ruto for the Petitioners and holding brief for Mrs Kipsang for the 1st & 2nd interested parties, Mr.Kombele for 1st Respondent and holding brief for Mr.Makhanu for the 3rd & 4th interested parties and Mr.Munyuni for 2nd Respondent;

IT IS HEREBY ORDERED

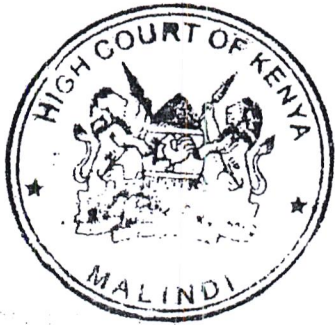
- a. **THAT** the Petition dated 21.3.2016 is merited and is hereby granted as prayed.
- b. **THAT** Section 30A of the copyright Act is unconstitutional as it was enacted without public participation and is being retrospectively applied.



- c. **THAT** a permanent injunction to issue restraining the 1st Respondent from remitting artist' royalties collected from the *Skiza* Tunes portal to CMOs.
- d. **THAT** and it is **HEREBY** declared that the August 2015 agreement between the 1st Respondent and the CMOs is irregular, unlawful and infringes on the petitioners' constitutional rights.
- e. **THAT** each party shall meet their own costs.

Given under my hand and the seal of this court at Malindi this 3rd day of November 2016

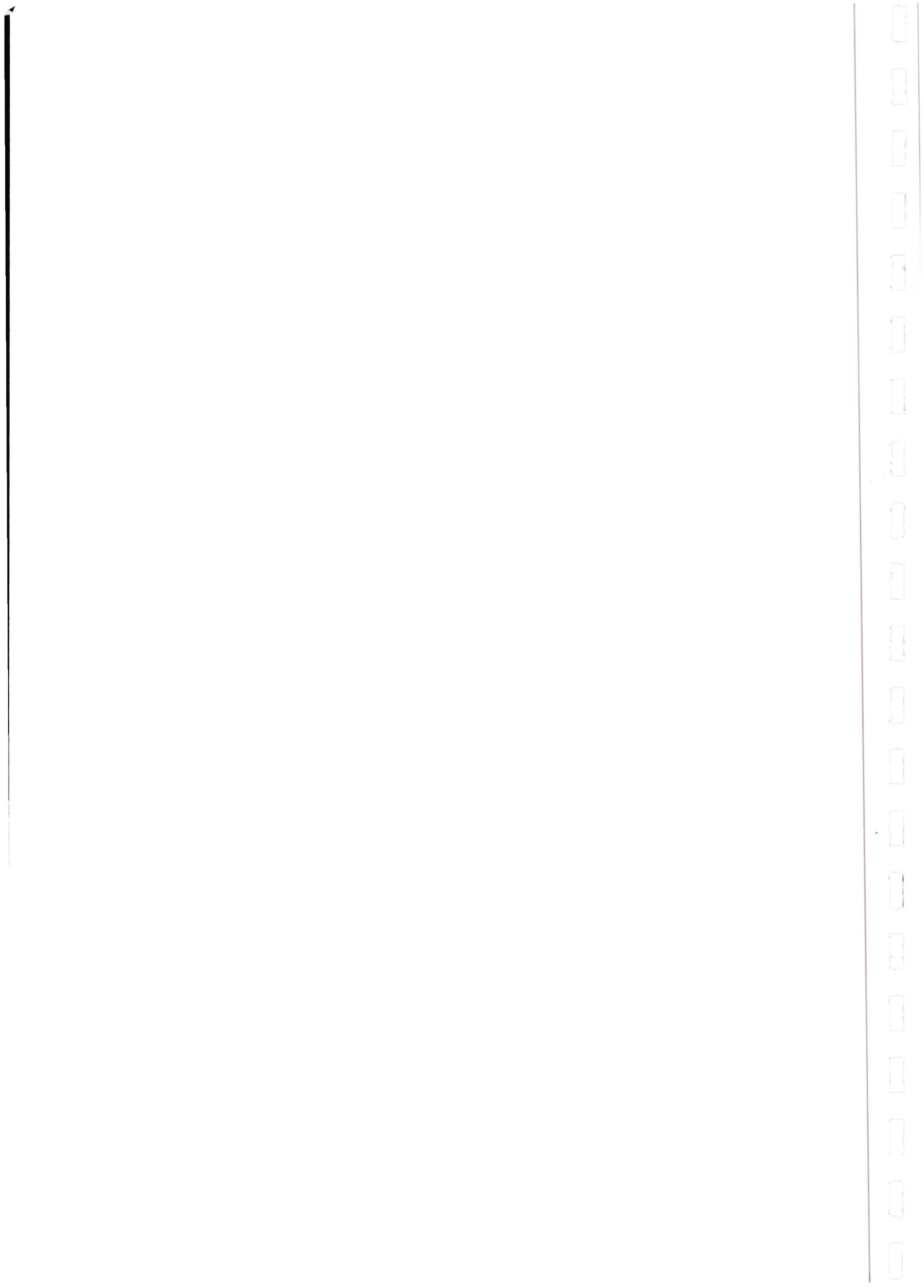
ISSUED at Malindi this.....th day of *November*, 2016



[Signature]
DEPUTY REGISTRAR
HIGH COURT OF KENYA
MALINDI

PENAL NOTICE;- TAKE NOTICE that any party served with this order and disobeys the same shall be cited for contempt of court and liable to imprisonment for a term not exceeding six Months.

[Signature]
Original Order required-





KILONZO & ASSOCIATES

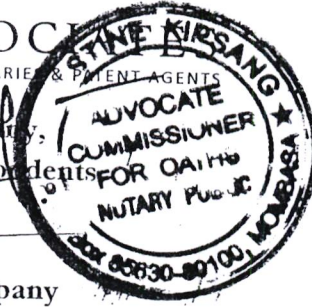
ADVOCATES, COMMISSIONERS FOR OATHS, NOTARIES & PATENT AGENTS

Christine Kipsang & Company

Advocates for the 5th & 6th Respondents

~~Machanu Odhiambo & Company~~

Advocates for the 7th & 8th Respondents



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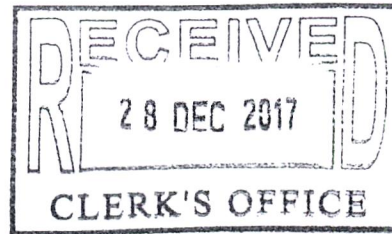


28/12/17

19th December 2017

Mr. Michael Sialai Rotich, EBS
The Clerk of the National Assembly
Parliament Buildings
Harambee Avenue
Nairobi

*Foreign / 28/12/17
Bng to the attache
Committee for
Constitution
Encl per
29/12/17*



Dear Sir,

RE: SUBMISSIONS ON THE COPYRIGHT (AMENDMENT) BILL, 2017

Please refer to the above matter.

MultiChoice Kenya hereby wishes to make formal representations to the National Assembly on the Copyright (Amendment) Bill 2017 and wishes to thank you for this opportunity to comment on the Copyright Amendment Bill.

1. Introduction

1.1 The general object of the Copyright Amendment Bill is to expand the scope of copyright protection, and also to expand the instances where use of copyright works would not constitute infringement. A very welcome step is that the Copyright Bill adds extensive protection in respect of broadcasts and signals, and provides for liability of Internet Service Providers (ISPs) in certain circumstances. It also has extensive provisions relating to the functioning of collective management organisations.

1.2 Whereas there are many positive amendments in the Copyright Amendment Bill, , there are some specific issues that we would wish to comment on with a view to adding value to the provisions contained in the Bill.

1.3 The issues we will comment on are the following:



- 1.3.1 Concerns about piracy and specific proposals on how it can be dealt with even further in the Bill; and
- 1.3.2 Concerns about unintended consequences of some provisions in the Copyright Amendment Bill.

2. Piracy

2.1 Piracy entails the unauthorised access, use and reproduction of another's work. It can take many forms and involves, amongst others, the following:

2.1.1 Unauthorized interception, decryption and retransmission of encrypted broadcast signals to-

- (a) multiple customers of commercial broadcasters (licensed or unlicensed) on cable, IPTV, or satellite networks; or
- (b) multiple dwelling units by apartment building managers, as part of their building management business.

2.1.2 Unauthorized interception, decryption and public exhibition of encrypted broadcast signals, in public commercial venues such as restaurants, bars, hotels, and members' clubs.

2.1.3 Unauthorized distribution and retransmission of broadcast signals (whether encrypted or free-to-air) on other platforms on a commercial basis, for example on the open Internet to increase traffic to and through online websites to increase advertising revenue or for payment.

2.1.4 Selling, advertising, and distribution of illicit devices or software to circumvent encryption measures to access TV services without permission or payment

2.2 There are several types of online cyber-piracy, for example-

2.2.1 live Internet streaming of unauthorised content without downloading the illegal content;



- 2.2.2 live broadcast, via Internet Protocol Television (IPTV), of unauthorised content without downloading the illegal content;
- 2.2.3 delayed Internet streaming of unauthorised content without downloading the illegal content;
- 2.2.4 downloading of copied broadcasts (movies, series, documentaries or Sport); and
- 2.2.5 copying and distribution of movies and TV series;

which content is, in most instances, acquired through unauthorised access to the broadcast signals of legitimate licensed broadcasting service providers.

- 2.3 Different websites make use of the above types of online cyber-piracy, including –
 - 2.3.1 streaming sites, which allow people to view unauthorised content on demand. These websites may stream directly or provide links to content hosted on other websites;
 - 2.3.2 cyberlocker sites, which offer fast, convenient and anonymous storing and distribution of content which can be downloaded or streamed;
 - 2.3.3 peer-to-peer sharing networks which allow the sharing of files among peers. Most peer-to-peer sharing networks are set up to ensure that files downloaded by individuals are also uploaded onto the site, so that any downloading of content by a member automatically results in the distribution of that content to others;
 - 2.3.4 linking websites, which collate thousands of links to pirated content often stored on external cyberlockers; and
 - 2.3.5 torrent websites which make use of BitTorrent technology to enable speedy distribution of large files (such as pirated movies and music) over the Internet.

Cost of Piracy

- 2.4 When broadcasting signals or audio-visual content is pirated, it results in revenue losses across the entire TV content distribution chain from the content producers to the TV platform companies.



- 2.5 Television content, whether on free-to-air or subscription platforms, has a cost to produce the same. Artists, performers, writers and producers of TV content earn their living by being creative and charging broadcasters for the right to show their content.
- 2.6 Licensed broadcasters make significant investments in the acquisition or licensing of programming from third parties, which they arrange and package with their own content in creating their programme schedule. Licensed broadcasters also invest in the equipment and infrastructure required to transmit that schedule as an electronic signal. They also make significant investments in marketing their content to increase viewership of their content. If financial returns are diverted to signal and content pirates, then it becomes difficult for a licensed broadcaster to continue to make these significant investments.
- 2.7 The loss of licensing revenue for broadcast programming does not only negatively impact the broadcaster, but also everyone else in the supply and distribution chain. Revenues to writers, screenwriters, artists, actors, musicians and other producers are reduced as a result of the decreased rivalry and demand for broadcasting content which piracy causes.
- 2.8 Piracy in Kenya therefore leads to rising costs for independent producers all the way through the value chain to platform providers and the end-user. Piracy also damages the national objectives of governments, amongst others the:
- 2.8.1 *investment environment* – investors are reluctant to invest in countries if they cannot earn a decent return because of competition from pirates who have no costs;
 - 2.8.2 *creative environment* – piracy impairs the development of indigenous content production and job creation in the sector;
 - 2.8.3 *rule of law* – pirates are usually not licensed and are broadcasting or distributing content that has not been authorised for distribution in that country;
 - 2.8.4 *government revenue* – pirates don't pay taxes, which can amount in some cases to millions of dollars. That's revenue that could be channelled by government for schools, housing, health care or even encouraging further growth in the communications sector; and



2.8.5 *growing the sector* - broadcasters and independent producers in developing countries are harmed the most by piracy as they don't have the economies of scale of international broadcasters or distributors and are heavily reliant on revenue generated by sale and the exploitation of their intellectual property rights.

2.9 Piracy that impacts on the growth of creative industries, thus also impacts on the economic growth of Kenya.

Harm to Sport's Contribution to Kenyan Economy

2.10 Sport events are a critical part of the sports industry and form the backbone of their contribution to the economy. There is tremendous economic activity around sports events ranging from, amongst others, licensing, sponsorships, broadcasting rights and advertising rights. Agreements are negotiated sometimes years in advance with Leagues, Sports Associations, Clubs, broadcasters and advertisers to secure investments. Digital piracy negatively impacts on all those businesses.

2.11 The sale of broadcast rights represents a substantial source of revenue to the sports rights owners who invest and distribute this revenue throughout their organisations, from grassroots to professional leagues and clubs. It is a core component of what makes them sustainable. The live unauthorised streams of sports events globally across the Internet is therefore one of the most critical threats facing sports rights owners currently. Sports associations and bodies receive no compensation from any pirated re-broadcast of their events, whereas those providing the pirated live data stream profit from advertising embedded in the website or the software client.

2.12 These free live streaming websites also cause harm to users and their devices. More than half of the streams provided by these free live streaming websites, according to research conducted in 2016, plant malicious software on users' machines through forced malicious ads and other deceptive techniques. The research also noted an increase in sites requiring the users to install browser plugins to watch the free stream, this software also allowed the hijacking or infection of normally safe websites that the user visits thereafter. For example, if a person installs an extension to watch a live stream of a sporting event and then visited government or news websites afterward the installed extension could change the



contents of those websites as they appear in the user's web browser so that they include malicious links and advertising.¹

- 2.13 This clearly indicates that the cost and issue of free live streaming goes beyond the ability of current copyright legislation to deal with. In fact, as the streaming is live and no download takes place to the hard drive of the user, in most cases a court may deem that no distribution of copies of works took place. Another aspect to consider is that as the main factor of a sport event is that as it is 'live' the damage is suffered immediately upon the illegal streaming commencing and the proposed takedown processes s.35B of the Copyright Amendment Bill do not address this harm as they do not offer immediate relief from damage.

No obligation to block infringing content

- 2.14 Of concern is that s.35B of the Copyright Amendment Bill requires intermediaries to take down content on their servers when valid take-down requests are received, but it does not impose an obligation on them to block content on websites (local or international) that collect, index and host torrents to pirated movies and TV series or streaming websites.
- 2.15 Essentially, this means that Kenyan law will have failed to keep pace of rapid technological changes brought about through the Internet leaving gaps in the law that can be exploited to prevent prosecution. Traditional copyright law requires a reproduction to have been made for violation to have occurred. In the case of steaming video where no content is physically stored on the hard drive and content is loaded directly and played from there in a buffered stream no reproduction or copy is made, making it difficult to enforce the rights of the copyright holder.
- 2.16 It could be argued that Virtual Private Network (VPN) service providers and suppliers of tunnelling software could be held liable for 'contributory infringement' for facilitating access to copyright infringing material, but once again in the context of streaming video, where there is no physical download to the end-users receiving device, it may prove difficult to demonstrate copyright infringement. This has resulted not only in the active provision or supply of technical methods to circumvent

¹ "Its Free for a Reason: Exploring the Ecosystem of Free Live Streaming Services" https://zubairrafique.files.wordpress.com/2015/10/flis_ndss16.pdf , accessed on 8 August 2017



geo-blocking², but also the rise of companies who offer these services for a fee. In Africa, Global SA³ has been operating since August 2013 offering Netflix and HULU packages which their website clearly indicates is “streamed straight out of the US to your home, office or wherever you are online”.

- 2.17 There is dire need for legislation that would impose requirements on ISPs to co-operate with rights-holders and government to police illegal file-sharing or streaming websites and to issue warnings to end-users identified as engaging in illegal file-sharing. This is an aspect that is not currently covered in, and we believe it needs to be addressed in the Copyright Amendment Bill.

Flaws in takedown process

- 2.18 The Copyright Amendment Bill fails to address specific issues that may require immediate action, such as live streaming of a live sport event. In s35B(4) of the Copyright Amendment Bill a 48 hour time limit is provided within which the ISP must take down or block access to illegal content or information. As the window for live events is usually much shorter than 48 hours it is clear that the proposed Copyright Amendment Bill takedown process cannot be the sole process available to deal with piracy issues.

- 2.19 Thus, it is proposed that the Bill should set out more specific notice-and-takedown laws in the Bill to address specific conduct where immediate action is required, for example child pornography, terrorism related information and live streaming of sporting events all of which clearly require a faster more immediate process to reduce harm.

3. Proposed Amendment to deal with the issue of with live streaming

- 3.1 The Copyright Amendment Bill can play a critical role in dealing with the damage that piracy has on local content industries and the economic contribution of sport events by putting in place necessary safeguards such as imposing requirements on ISPs to co-operate with government, law enforcement and rights-holders to block illegal streaming websites. A very recent UK High Court decision in July 2017

² *Geo-blocking* is a form of technological protection measure where access to Internet content is restricted based upon the user's geographical location. <https://en.wikipedia.org/wiki/Geo-blocking>

³ <http://www.globalsa.co.za/onDemandTV.php>



allowed the English Soccer's Premier League to pre-emptively require that ISPs in the United Kingdom (UK) block servers that are hosting illegal streams of its matches. The order was put in place for the entirety of the 2017-18 Premier League season which commenced on 11 August 2017. A similar order was obtained for the final two months of the 2016-17 season allowing more than 5,000 server Internet Protocol (IP) addresses to be blocked that previously were streaming illegal Premier League content. In doing so the English Premier League is protecting the rights it sold to Sky and BT for more than £5bn to show live matches over three seasons.⁴

- 3.2 Accordingly, it is proposed that in order to allow pre-emptive blocking of servers hosting illegal streams prior to a live event the owners of the exclusive copyright may apply to the High Court for an injunction. We propose the insertion of a new section 35D in the Bill as follows as follows:

"Order against Internet Service Providers

35D The High Court may, upon application by any person who has reasonable grounds to believe that copyright is being or may be infringed by any person situated inside or outside Kenya, grant any relief, including urgent relief, which it deems appropriate, including granting an order requiring –

- (a) any person who enables or facilitates the infringement of copyright, or whose service is used by any other person to infringe copyright, to cease such enabling or facilitating activity or disable that person's access to its service for the infringing purpose;
- (b) any person who hosts or provides an online location, service or facility situated inside or outside Kenya which is used by any person to infringe copyright or which enables or facilitates the infringement of copyright, to disable access to such online location, service or facility as replaced, amended or moved from time to time; or
- (c) any internet service provider to prevent or impede the use of its service by any person in order to access an online location, service or facility situated inside or outside Kenya, as replaced, amended or moved from time to time, which is used to infringe copyright."

⁴ <http://www.telegraph.co.uk/technology/2017/07/27/premier-league-lands-game-changing-court-order-war-illegal-streaming/>



- 3.3 The implementation of the High Court Order in the UK was made possible by video monitoring technologies used by the Football Association Premier League and advances in the ISPs' blocking systems, which enable the blocking and unblocking of IP addresses during the course of a match, in some cases using automated technology systems.
- 3.4 It is counter-intuitive that one must go to court to order ISPs to block IP addresses that are currently infringing content by live streaming or providing access to terrorist information or malicious software or that facilitate cyber-extortion when in fact ISPs are already able to use blocking systems and can easily acquire systems that automate such a process. The protection of live content requires the takedown of the infringing content as rapidly as possible.
- 3.5 We therefore further proposed that the Bill also requires Kenyan ISPs to put in place an online tool (such as a web form) that will automate the removal of content at a location specified in a notice filed on an urgent basis by a content rights owner or the Kenya Police Service. For instance, YouTube's Content ID system provides a model that allows verified copyright owners to remove material, rather than rely solely on YouTube to do so. Such a system would allow for fast-tracked processing of a takedown notice made under s35B of the ECT Act and/or the provisions of the Bill.
- 3.6 We propose the insertion of a new section 35C(3) after section s35C(2) in the Bill as follows:

"35C (3) An Internet Service Provider shall implement automated takedown forms that allow-

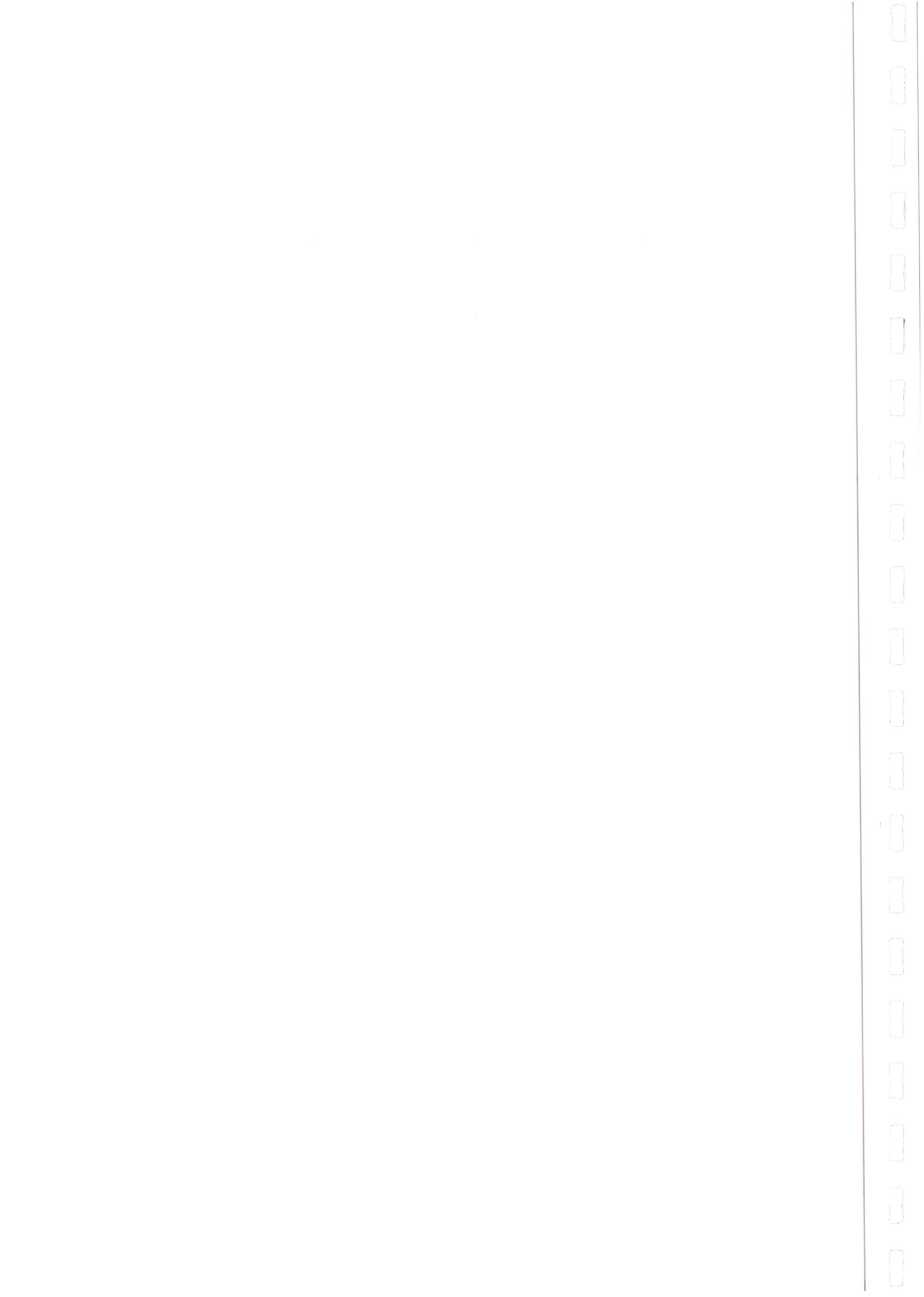
- (a) verified owners of exclusive copyrights the ability to remove infringing live streaming data immediately; or
- (b) specifically designated police officials the ability to remove terrorist information or content that facilitates or incites criminal actions.

(2) The online automated takedown form must include, in addition to the Internet Protocol address of the allegedly infringing live streaming data, fields for the required information in s35B(2)."

4. Technological Protection Measures



- 4.1 “Technological protection measures” is a term that covers many different types of technologies used to control access to copyright content, or to prevent users from copying protected content. Broadly speaking there are two types of technological protection measures, namely access control technological protection measures and copy control technological protection measures.
- 4.2 Access control technological control measures are technologies that are used by copyright owners to control access to their content, such as password control systems (e.g. password that limits access to content on a website or server), conditional access systems (e.g. access is limited to pay television services or pay video-on-demand services on terrestrial, cable, satellite or broadband platforms), time access control systems (e.g. access control that disables access to rental films after 24 hour period has elapsed) or encryption measures applied to DVDS or blu ray disks that can only be played on authorised devices.
- 4.3 Copy control technological control measures are technologies that are applied to the copyright content itself which prevent, obstruct or restrict the copying or sharing of that content, such as software locks which prevents copying of computer program), encryption measures stored on disk which prevent copying of content on the disk, technology that locks documents so that they cannot be copied or a technology that makes unauthorised copies of a film un-viewable.
- 4.4 There are some jurisdictions where due to exceptions or limitations on copyright or ‘fair use’ persons are allowed to remove, disable or circumvent copy control technology, but there are almost never any circumstances where persons are allowed to remove, disable or circumvent access control technology. There are only two situations where one is allowed to remove, disable or circumvent an access control technology that is when ordered to do so by a court or if permission has been obtained to do so by the copyright owner.
- 4.5 The reason for that prohibition against circumventing access control being stricter than copy control is that even if there is some content that is in the public domain or which falls under allowed exceptions or limitations allowed within copyright law, there is also a great deal of content which is exclusive or privileged and which is protected under law, i.e. the harm that is created by such an act would far exceed the good. For example, a citizen can claim access to public information held by a government department and an Access to Information regime is put in place under which that citizen can apply to have access to such information, but the law would



not tolerate that same citizen hacking the government password protected server containing that information as it may also hold legally privileged or classified documents to which they are not lawfully permitted access to.

4.6 Technological Protection Measures using both access control and copy control technologies are a critical tool used in the protection of copyright works and play a vital role in enabling copyright owners (rights holders) to offer content to consumers in many different ways and using many different digital platforms. Kenyan law needs to protect the right of copyright owners to use technological protection measures to protect their works and circumvention of such technology must be declared illegal.

4.7 In this regard, the European Copyright Directive⁵ states:

*"Technological development will allow rightholders to make use of technological measures designed to prevent or restrict acts not authorised by the rightholders of any copyright, rights related to copyright or the sui generis right in databases. The danger, however, exists that illegal activities might be carried out in order to enable or facilitate the circumvention of the technical protection provided by these measures. In order to avoid fragmented legal approaches that could potentially hinder the functioning of the internal market, there is a need to provide for harmonised legal protection against circumvention of effective technological measures and against provision of devices and products or services to this effect."*⁶

4.8 EU member states must therefore provide adequate legal protection against –

4.8.1 the circumvention of any effective technological measures which the person concerned carries out in the knowledge, or with reasonable grounds to know, that he or she is pursuing that objective; and

4.8.2 against the manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of devices, products or components or the provision of services which: (a) are promoted, advertised or marketed for the purpose of circumvention of, or (b) have only a limited commercially significant purpose or use other than to circumvent, or (c) are primarily designed, produced, adapted or

⁵ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society ('the Copyright Directive')

⁶ Recital 47 of the Copyright Directive



performed for the purpose of enabling or facilitating the circumvention of, any effective technological measures.⁷

4.9 The Copyright Amendment Bill proposes amending s.38 of the principal Act to achieve these very same objectives by inserting subsection (1) that circumventing a technical protection measure or manufacture or distribution of devices designed for circumventing a technical protection measure is an offence. However, it also provides in s.26B of the Copyright Amendment Bill that circumvention of technological protection measures shall be permitted in limited circumstances set out in Second Schedule to the Act. However, the Copyright Amendment Bill then does not set out what these circumstances are.

4.10 In approaching these circumstances, as indicated above both types of technological protection measure are critical for the prevention of piracy, however, bearing in mind that a different approach is followed internationally to exceptions and limitations to copyright with regards to permissible circumvention there is merit in making a distinction between copy control and access control in the Copyright Act. We therefore propose that a definition be inserted in the Copyright Act that creates scope for a distinction between these two types of technological protection measure:

"technological protection measure' means any process, treatment, mechanism, technology, device, system or component that in the normal course of its operation is used to prevent or restrict acts in respect of a copyright which are not authorised by the rightholder of any copyright, including, without limitation, any access control or copy control measures."

4.11 To the extent that there are concerns that these technological protection measures provisions would block lawful access to public interest information, voluntary measures could be considered as contemplated in the EU Copyright Directive described above.

4.12 In our view, the only circumstance in which a technological protection measure circumvention device should be permitted to be used is (i) where the owner of the technological protection measure has consented to that use; (ii) for the purposes of law enforcement and (iii) where ordered by a court or the Tribunal in respect of technology protection measures. We therefore recommend that the following section be in the Second Schedule to deal with permitted circumstances of

⁷ Art 6(1) and (2) of the Copyright Directive



circumvention of technological protection measures as contemplated in s26B of the Copyright Amendment Act:

"E. Technological Protection Measures

(1) Nothing in this Act shall prevent an authorised State investigative, protective or intelligence agency using a technological protection measure circumvention device for law enforcement purposes.

(2) Save for those persons authorised in subsection (1), any other person who wishes to use a technological protection measure circumvention device must obtain the written consent of the owner of the technological protection measure in respect of which the device is proposed to be used before doing so. Should the owner refuse, unreasonably, to grant consent to the use of the device in the manner aforesaid, that person may apply to the Copyright Tribunal for an order that he or she be permitted to use the device in relation to the technological protection measure work and Copyright Tribunal may, if it is satisfied that the device is intended to be used so as to enable the person to perform an act in relation to the technological protection measure work which is permitted in terms of this Act, grant such an order on such conditions as it deems fit."

4.13 If the route we have suggested in our proposed amendment above is followed, persons who believe they have right to access in terms of exceptions and limitations in the Copyright Act will be able to raise their issue with the Tribunal.

5. Unintended Consequences

5.1 s35 on infringement is amended by the insertion of s35(2A) to provide that the broadcasting of a sound recording in whole or in part either in its original form or in any form recognizably derived from the original without the consent of the producer is an infringement of the producer's rights. This does not take into account the nature of a broadcaster that acquires complete channels and has no control over the content on the channels, and is therefore not in a position to obtain a producer's consent.

5.2 s38A introduces offences by body corporates and deems a principal officer guilty of an offence. This purports, therefore, to make any principal of such juristic person guilty of transgressions of the Act unless that person can show that they did not know the offence had been committed or, knowing that it was to be committed, tried to prevent it. This is not in line with the presumption of innocence in Article 50(2)(a) of the Constitution.

5.3 s38 of the Copyright Bill requires the offending person to know that copyright subsists in a broadcast or signals, and that rebroadcast, transmission or distribution constitutes an infringement of the copyright. However, intention of infringement and



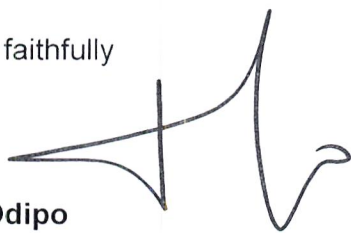
knowledge of copyright are not a necessary ingredient for copyright infringement, and we propose that the words "in the absence of a legal right or obligation whether in terms of this Act or any other law" replace the requirement for knowledge.

6. Concluding remarks

6.1 We trust that the above comments will be taken into account by the National Assembly in order to improve the provisions of the Copyright Amendment Bill, 2017 and to further align it with international best practices as set out in our submissions.

6.2 We are grateful to the National Assembly for granting us this opportunity to highlight our submissions and look forward to further engagements on the provisions of the Bill.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Eric Odipo', with a stylized flourish at the end.

Eric Odipo
Managing Director

.....

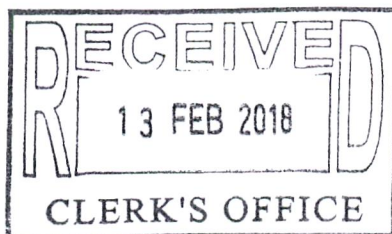


33
OD/Committee
13/2/18

9th February 2018

Our Ref: PRISK/NA/02/18

**Mr. Michael R. Sialai, EBS
Clerk of the Kenya National Assembly,
Parliament Buildings,
P.O Box 41842 - 00100,
Nairobi, Kenya.**



② Kineser
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AA
14/2/18

Dear Sir,

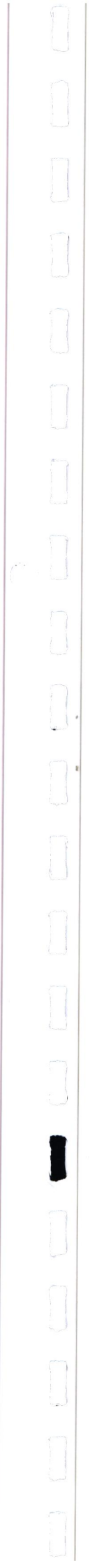
Re: Re-Introduction of Section 30A as part of the Copyright Amendment Bill

Pursuant to Article 118 (1)(b) of the Constitution of Kenya that calls for public participation in the legislative process, and pursuant to your advertisement referring thereto, we as the Performers Rights Society of Kenya (PRISK), formally seek to make application of the subject referred to herein, that the previously repealed Section 30A be reintroduced into the Copyright Act (Cap 130) and therefore included in the current Amendment Bill.

Background

The now repealed Section 30A of the Kenya Copyright Act, 2001 had been introduced in 2012 through the Statute Law (Miscellaneous Amendments) Act, 2012. The Miscellaneous Amendment Act was introduced in Parliament on 19th December 2012 and was signed by the President on 31st December 2012. The Section introduced the right to equitable remuneration for use of sound recordings and audio-visual works henceforth acknowledging the essential contribution of performers of sound recordings and audio-visual works in the creation of recorded music and film works by including a right for the performers, which is in line with international best practices.¹ The rights to equitable

¹ Article 15, WIPO Performances and Phonograms Treaty (1996).



remuneration are the rights of performers to be paid fairly for the broadcast and communication to the public of their works.²

Justification for the Equitable Remuneration Right

Equitable Remuneration Right provision is intended to protect and secure the financial interests of certain vulnerable persons in the Copyright value chain who would otherwise be compelled to sign off their rights to future remuneration for lump sum or one off payments.

The European Union makes reference to this fact, articulating that the creative and artistic work of authors and performers necessitates an adequate income as a basis for further creative and artistic work, and the investments required particularly for the production of phonograms and films are especially high and risky.³ The possibility therefore of securing that income and recouping that investment can only effectively be guaranteed through adequate legal protection of the right-holders concerned, therefore necessitating an unwaivable equitable remuneration to the right-holder concerned.⁴

Section 30A is repealed

On 3rd November 2016, Section 30A was declared unconstitutional by the High Court at Malindi in *Mercy Munee Kingoo & Anor v. Safaricom Limited & Anor.*⁵ The Court, finding in favor of the applicants, reasoned their judgment as to the fact that stakeholders were not engaged and the introduction thereof ought to have been subjected to public participation. It is worth noting that in two previous petitions of the same subject matter had been dismissed before the Court.⁶

Case for reintroduction

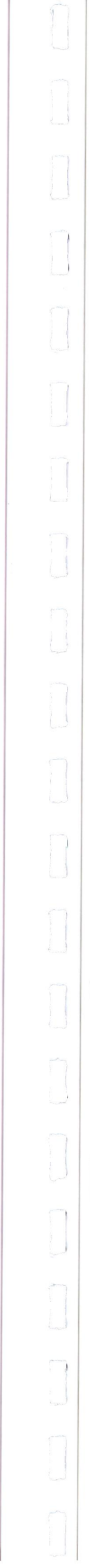
² Nzomo V, Performers' Rights: Positive Amendments to the Kenya Copyright Act, 18 May 2012: <https://ipkenya.wordpress.com/2012/05/18/performers-rights-positive-amendments-to-the-kenya-copyright-act/> accessed on 10th February 2018.

³ *Vereniging van Educatieve en Wetenschappelijke Auteurs (VEWA) v Belgische Staat*, Judgment 30 June 2011.

⁴ Osborne R, 'Is Equitable Remuneration Equitable? Performers' Rights in the UK', *Popular Music and Society*, Vol 40, 2017, 573-591.

⁵ *Malindi High Court Constitutional Petition No. 5 of 2016.*

⁶ *Xpedia Management Limited & 4 Others v. The Attorney General & 4 Others*, Petition No. 317 of 2015; *David Kasika & 4 Ors v. Music Copyright Society of Kenya*, Petition No. 350 of 2015.



In the void since created by the repealing of Section 30A, there has been an ambiguity created as to the rights of performers of films and phonograms. The time is right and necessary for reintroduction of an emphatic provision on equitable remuneration. Reintroducing this provision at this stage would cure the defect identified by the Court in *Malindi Constitutional Petition No. 5 of 2016* as it would now be subject to public participation, and has already been identified as a dire need by stakeholders in the creative industry.⁷

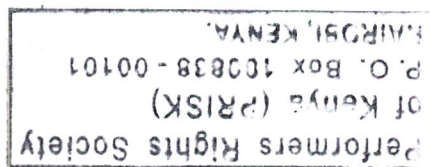
Section 30A would continue to ensure that the essential contribution performers and of sound recordings and audio-visual works make in the creation of recorded music and film works are rewarded for the broadcast and communication to the public of their works. This shall go a long way in ensuring that the creative industry is more than just a footnote in the social and economic goals outlined in Kenya's Vision 2030.⁸ By ensuring that performers and producers are economically empowered, this will give them more economic agency to continue to build the nation, as is in the footprint of the current government's manifesto and the Bill of Rights in the Constitution of Kenya.⁹ As aforementioned, reintroduction will also put Kenya in line with international best practice and treaties, in line with article 2(5) of the Constitution of Kenya.¹⁰

We hope for a positive response and action from you.

Yours Sincerely,



Beatrice Achieng,
Chairperson,
Board of Directors,
Performers Rights Society of Kenya (PRISK).



Cc: The Executive Director
Kenya Copyright Board of Kenya

⁷ Nzomo V (n2).

⁸ *Kenya Vision 2030*, 10 June 2008.

⁹ *Jubilee Manifesto*, 2017.

¹⁰ Article 2(5), *Constitution of Kenya* (2010).





IRENE MURUGI KARIUKI
 P.O BOX 101586-00100
 NAIROBI
 MOBILE: 0722-809283

① *cutler*
 13/2/18

TO:
 THE CLERK OF THE NATIONAL ASSEMBLY
 P.O BOX 41842-00100
 NAIROBI



② *EMERSON*
pls deal
FA
14/2/18

9th February 2018

Dear Sir,

REF: PLEA FOR RE-INTRODUCTION OF SECTION 30A IN THE COPYRIGHT ACT, 2001.

Following a call for submission of memoranda on the Copyright (Amendment) Bill 2017 that appeared on the Daily Nation of 6th February 2018. I would like to submit as follows:

My name is Irene Murugi Kariuki, an accomplished actress who started my professional acting career in 1993. I began as an actress in the Vioja Mahakamani TV program being paid a paltry Kshs 300/= per month and have never looked back since then. I have had numerous breaks in my career when I started voicing Radio Advertisements and TV advertisements namely Chipsy +3, Exe Chapati, Waterguard, KCB Pesa Mkononi, and the latest Pika Cooking Oil. It has not been an easy feat considering the poor payment for the work done. As an actress I only receive a one time payment of between Kshs 50,000/= to Kshs 70,000/= from the adverts with a buyout of two (2) years which is very little compared to the amount the companies that advertise these products pay in airtime for broadcasting the adverts. It is the same scenario for Television programs like Makutano, Siri, and many others where the producers continue to earn for my works in perpetuity. It is open knowledge the plight that surround Performers mostly Actors and Actresses like the late Mzee Ojwang whose works I hold in high esteem, Mzee Tamaa, Masanduku, Otoyobambala, Inspector Wariahe, Mama Kerekani, amongst others (all deceased) who died in poverty.

When Section 30A was introduced to the Copyright Act, 2001 in 2012, this came as a sweet relief to me and my fellow actors and actresses where for once we could breath a sigh for relief for we could be equitably remunerated through royalties being collected on our behalf and be distributed back to us.

However last year 2017 I found out that the Section had been deleted from the Act once again denying me remuneration for the works and talent that I continually render. This is not only denying me and the hundreds of other Performers like myself the Right to be equitably remunerated for our works and talents.



With the re-introduction of this Section of the Act, I stand to benefit – not only myself but all the Performers in this country and hence will be part of the fulfillment of the Jubilee Manifesto to create an enabling and empowered creative industry in Kenya. Right to fair remuneration and fair compensation is also enshrined in our Constitution.

This will also ensure that Kenya is aligned with International Standards in the protection of the rights of Performers.

I hope that this plea shall be considered during the second reading and Section 30A re-introduced back in the Copyright Act of 2001.

Yours faithfully,



Irene Kariuki.



① J. Hutter

19/2/18



Rue du Prince Royal 85,
1050 Brussels
Belgium

PRESIDENT
Rainer JUST

CHIEF EXECUTIVE & SECRETARY GENERAL
Caroline MORGAN

**The Clerk of the National Assembly of Kenya,
Main Parliament Buildings,
P.O. Box 41842-00100
Nairobi, Kenya**

② Emerson
pls deal
FA
19/2/18

By email: clerk@parliament.go.ke

Brussels, 13 February 2018

IFRRO'S SUBMISSION ON THE COPYRIGHT (AMENDMENT) BILL, 2017

Dear Sir,

In the context of the public consultation on the Copyright Amendment Bill, IFRRO would like to send you a submission with our written comments on the bill. We also support the comments and proposals made by IFRRO's RRO member in Kenya, KOPIKEN.

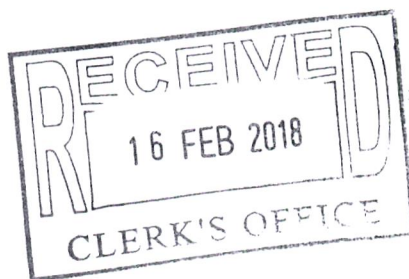
SPECIFIC PROVISIONS OF THE BILL

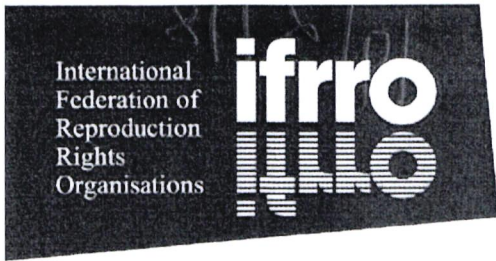
Terminology

IFRRO supports the proposal under Section 24 of the bill to replace "collecting society" with "collective management organisation". This is fully in line with international practice and reflects how CMOs are being referred to at WIPO, in other international fora as well as in many countries.

Artist resale right

We welcome the introduction of a resale right under Section 26D of the bill. The resale right provides an essential remuneration to artists, and its introduction into Kenyan law is very timely when more and more countries – but only a tiny few in Africa and no country yet in the English-speaking part of the continent, meaning that Kenya would be the first one – have introduced it in their national legislation. After the International Conference on Artist's Resale Right that was held at WIPO in April last year and the proposal made to add the resale right as an item on the agenda of the Standing Committee on Copyright and Related Rights, there is a





momentum to introduce this right in national law and we wish to congratulate Kenya for paving the way in that regard.

Reproduction of text and image works in educational institutions

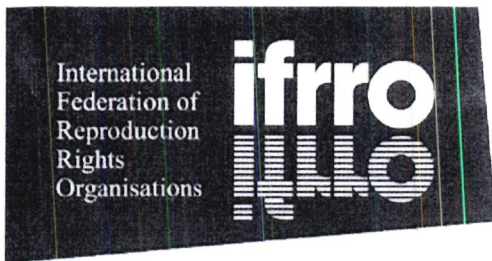
We are pleased to read the changes that the bill is proposing to make to the legal framework for exceptions and limitations in Kenya. These changes would bring the Kenyan legislation in line with international practice, where in more and more countries rightholders are being compensated through different mechanisms.

In particular:

- We welcome and wholeheartedly support the introduction of a licence override mechanism, as provided for in the Second Schedule under Section B (1) (b). Subjecting the right to reproduce works for teaching in educational institutions to the availability of a licence has become a common, flexible and efficient way of fairly compensating authors and publishers while enabling wider access to works. Indeed, licence override provisions can be found in the laws of Botswana, Ghana, Mauritius and Zimbabwe, as well as in the legislations of Ireland and the United Kingdom, for instance. Furthermore, a provision (Article 4) in the draft European Union's directive on copyright in the Digital Single Market that is currently being discussed will, if adopted, enable all 28 EU Member States to implement a licence override mechanism.

We therefore submit that introducing this mechanism is in line with the developing norms regarding the use of content in education and will in no doubt make it easier for KOPIKEN to fulfil its mission and for educational institutions to have legal and easy access to copyright-protected works.

- Under Section B (1) (a), we note that often even a page can be a whole work, for example with poetry or an image, so we support a clarification to ensure that never a whole work, even if it fits on one page, can be copied under this provision.
- Section B (1) (b) only refers to "reprographic reproduction", it would be welcome if the provision can be amended in a way that makes it clear that it applies to analogue and digital uses alike, given that digital uses are more and more widespread.



- Finally, when a licence is available, we would suggest having a set of provisions – in case there are none – dealing with rate setting disputes, in the event of a dispute between the RRO and a licensee.

PROPOSED ADDITIONS TO THE BILL

We would suggest, building on the welcome introduction of a resale right, that Kenya considers introducing two other mechanisms that (i) enable rightholders to be compensated when their works are lent in libraries and (ii) enable rightholders to be compensated for the copying of their works on devices and media capable of such reproduction.

Public lending right

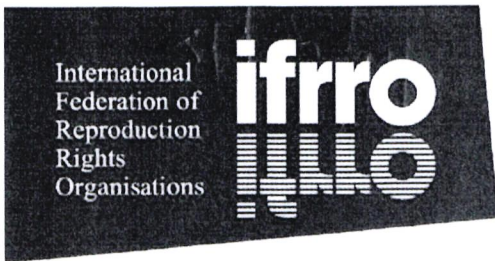
Public lending right is the legal right that rightholders have to receive payment from governments to compensate them for the free lending out of their books by public and other libraries. Whilst not implemented in all countries, it has gained attention over the last years and has been implemented in 33 countries, most of them in Europe, but also in Australia, Canada, Israel and Malawi which is set to become the first country in Africa to implement a public lending right following its introduction in the amended Copyright Act 2016.

IFRRO supports the introduction of a public lending right in Kenya which could then pave the way for other African countries to follow the lead and introduce this scheme in their national legislation. Revenues stemming from the public lending right are a substantial contribution to the life and work of writers.

Copyright (private copying) levies

Copyright levies, sometimes referred to as private copying levies (when they only apply to the private copying of works) are a common way of remunerating rightholders in Africa and in Europe. Devices and media used to copy copyright-protected works will be subjected to a fee when they are imported, manufactured and/or sold, which will be collected by a CMO and passed on to rightholders. We understand that in Kenya, at the moment, levies are collected only for sound recordings and are distributed to producers and performers.

Levies indeed vary from one system to another, but they will generally apply to both devices and media that can only copy text and image works (so-called “reprography levies”) and to media and devices that can copy text and image and other kinds of works (private copying levies), thus encompassing all kinds of works and rightholders. A good example of this



approach is the new Copyright Act of Côte d'Ivoire (2016) that provides for private copying levies (Articles 101 to 104) and reprography levies (Article 105 to 107).

As documented in the joint IFRRO-WIPO International Survey on Text and Image Copyright Levies (the third edition of which was released in June last year and can be found here: http://www.ifrro.org/sites/default/files/wipo_ifrro_pub_1042_2017.pdf), Reproduction Rights Organisations (RROs) collect the levies on devices that can only copy text and image works and they also receive the proportion relevant to text and image works in countries where other devices and media, such as PCs, hard discs, CDs, DVDs and USBs are made subject to a levy.

An increasing number of countries are choosing to implement levies: in Africa alone, Côte d'Ivoire (July 2016) and Mali (June 2017) have introduced levies in their Copyright Act; CMOs in Algeria, Burkina Faso, Cameroon and Ghana have administered levy systems for a long time; Malawi, Nigeria and Tunisia have levies in the legislation and will soon start to collect them; and proposals are being made in Uganda and other countries to introduce levies.

IFRRO therefore supports the introduction of levies to the benefit of authors and publishers in Kenya as we understand that rightholders, and their RRO KOPIKEN, are in favour of such introduction.

We thank you in advance for considering our submission and we stand ready to provide any further information in relation to the above-mentioned issues.

Yours sincerely,

A handwritten signature in cursive script, appearing to read "Caroline Morgan".

Caroline Morgan,
Chief Executive and Secretary General,
IFRRO

A handwritten signature in cursive script, appearing to read "Lesburguères".

Pierre-Olivier Lesburguères,
Manager, Policy and Regional Development,
IFRRO

A PRESENTATION TO THE COMMITTEE ON COMMUNICATION, INFORMATION AND INNOVATION ON THE COPYRIGHT AMENDMENT BILL 2017

Prepared by Edward Sigei, Executive Director, Kenya Copyright Board

The Copyright Amendment Bill 2017 was prepared by the Kenya Copyright Board (KECOBO) in line with section 5(d) of the Copyright Act which mandates the organization to:

'Organise legislation on Copyright and related rights; propose other arrangements that will ensure its constant improvement and continuing effectiveness'

The effort is partially related to section 5(a) of the Copyright Act:

'Implementation of laws and international treaties and conventions which Kenya is a party'

The Bill is meant to amend the Copyright Act 2001 and bring it up to date in line with the technological developments that continue to affect the exploitation and protection of copyright works. This will ensure that Authors of Copyright works get value for their property in the digital environment.

The Bill has been subject of intensive consultations with most of the stakeholders in public forums organized by KECOBO.

The Copyright Amendment Bill 2017 mainly affects the following areas

- Definitions
- Board matters
- Registration
- Fair dealing and access to reading material for visually impaired persons in line with the Marrakesh Treaty domestication
- Blank Media Levy
- Assignments
- Internet Service Provider Liability in cases of online infringements of Copyright
- Offences under Copyright
- Oversight of Collecting Societies
- Introduction of Resale Rights for visual artists

The issues the Bill seeks to solve are detailed as follows:

Definitions

The Bill contains definitions of terms of three types proposed to be added to section 2 of the Copyright Act:

- a. New definitions to cater for provisions newly proposed under Bill. The new definitions are dealing with ISP Liability, Resale right for visual artists and domesticating Marrakesh Treaty.
- b. Old definitions moved from the Copyright Regulations into the main Act since they affect the proper implementation of the Act
- c. Amendments to existing terms to conform to current realities including the Constitution.

Board of Director and Executive Director Qualification

The Bill changes the titles of the members of the Board due to the provisions of the Constitution 2010 provisions especially touching on government directors under section 3 of the Copyright Act.

Section 11 of the Act and makes changes touching on the qualifications for appointment as Executive Director of the Kenya Copyright Board.

The changes were prompted by Mwongozo policy provisions and the constitution of Kenya 2010.

Registration of Copyright

The Bill makes provision for Registration of Copyright Works currently missing in the Act under the proposal amending section 22 of the Act.

The Act is currently silent on this core function of the Organization. The proposal closes that gap.

Fair dealing and new rights in line with the domestication of the Marrakesh Treaty

The Bill proposes to recast section 26 to take into account the creation of new Artist resale Right, rights of visually impaired persons and extent of technical protection measures. The section makes provision for a new right for Visual artists and access to reading material by Visually Impaired Persons in line with the Marrakesh Treaty. As a result there is a new schedule added to the Act to be

read with section 26 of the Act. The schedule provides details of the extent of public rights or fair dealing provisions that arise from the use of certain Copyright works.

This was proposed for clarity and to expand the Copyright user rights.

Blank Media Levy

The Bill proposes changes to section 28 of the Act to reflect the manner in which blank media subject of this provision generally enters the Kenyan market hence determines where the fee is paid

The Bill also amends section 28 and 29 by a new proviso to better provide for the collection of Blank Media Levy under section 30B.

The provision is intended to support the operationalization of the Blank Tape Levy provisions currently not collected as required by the current Act.

Assignments and Licenses

The section proposes changes to the procedure of managing Assignments and Licenses of Copyright works to better serve the interests of copyright owners as provided under section 33 of the Act. It removes the requirement to obtain letters of verification from KECOBO for assignments from abroad.

The provision is to provide for clarity in the management of Copyright.

Internet Service Provider Liability for Online infringements

The Bill introduces the concept of Internet Service Provider Liability for copyright infringement online currently lacking in our Legislation. It comes with the necessary safe harbours, take down procedure and the extent of liability after the takedown notice has been served under section 35 of the Act.

The current law has no provisions on this matter. This will enhance enforcement noting that most of the piracy is now online. The recent experience in the case of Joe Khamis Book 'Looters and Grabbers' illustrates this lacunae.

New Copyright offences and sentences

The Bill provides new Copyright offences in line with the technological development and proposes new objective criteria for sentencing of convicted offenders based on value of the goods seized and the market price. It also

provides for a situation where offences are committed against rights managed by collective management organizations. This is an amendment to section 38 of the Act.

The provision is to provide objective criteria for sentencing to manage the clamour for the raising of fines and jail terms.

Reform of the Collective Management Organization (CMO) oversight function

The Bill proposes name change from collecting Societies to collective management organizations in line with the international standard and to better reflect the role.

The Bill deals with the process of receiving and processing applications for licenses and the manner of oversight resulting from experience and calls from members of the societies. The section also provides for the process of de-registration of such organizations. The provision amends section 46 of the Act.

The Bill proposes term limits and qualification of a director of a collective management organization and oversight measures that can be taken instead or before the process of de-registration begins. This is currently not provided for under the Act.

The Bill proposes to change the name of the Competent Authority to Copyright tribunal established under section 47 of the Act and directs for its management under the Office of the Attorney General.

The provisions on the supervision of CMOs have been wanting under the current legislation. The Bill makes adequate provisions to enable KECOBO intervene if member interests are threatened and allow for continued existence of the Society hence making de-registration an act of the last resort.

SUBMISSION

The Kenya Copyright Board considers the Bill as critical in achievement of its mandate. This mandate touches the creative sector, a sector critical in the economic future of the country. The passage will support the achievement of the Big Four Agenda and the Vision 2030 as it provides employment and business opportunities to Youth. The Bill contains new provisions which will

support enforcement of Copyright and Oversight of agencies established by the Act.

The Bill updates the legislation in this area by inclusion of ISP Provisions and Resale rights as well as access to reading material for the Visually Impaired Persons. In the case of visually impaired persons, it domesticates the Marrakesh Treaty that Kenya ratified early last year.

In areas of ISP Liability and the new offences, it takes into account the experience of recent years and technological stage that we are at.

The major stakeholders in the sector were consulted and the Bill represents an acceptable compromise. The support of the Committee in the passage of the Bill with suitable changes will be highly appreciated.

STATUTE LAW (MISCELLANEOUS AMENDMENTS) BILL 2018

The proposal contained in the above Bill was initiated by Kenya Copyright Board as part of its Reform in line with Mwongozo Guidelines that require Boards to be between 7-9 members.

The current Act results in a Board of 20 members. For a small cash strapped entity, this has an impact on its operations.

End

